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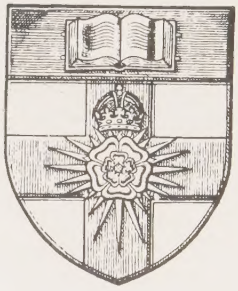

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THE CRIMINAL APPEAL REPORTS

VOLUME 37

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CRIMINAL APPEAL REPORTS

JANUARY 19, 1953 TO DECEMBER 18, 1953

EDITED BY

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW, RECORDER OF NEWARK

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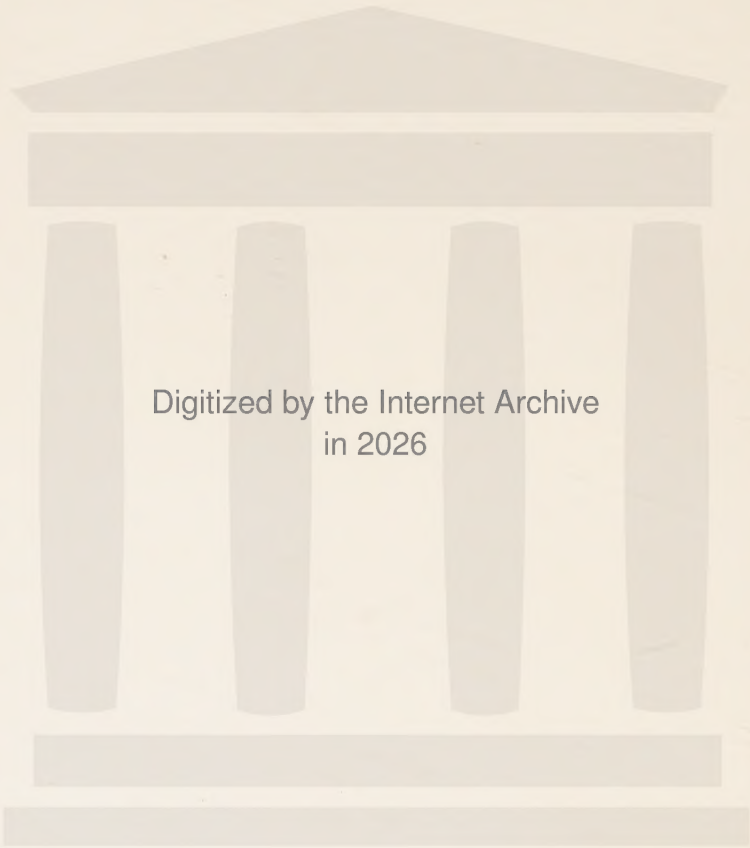

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CROOM-JOHNSON AND MR. JUSTICE PEARSON

CHARLES MELVIN
CLEMENT EDEN

1953
Jan. 19

Verdict—Substitution—Acquittal of Larceny and Conviction of Receiving—No Power to Substitute Verdict of Guilty of Larceny—Criminal Appeal Act, 1907 (*7 Edw. 7, c. 23*), *s. 5* (2).

Where an indictment contains counts for breaking and entering and larceny and receiving and the jury have returned a verdict of Not Guilty of breaking and entering and larceny and Guilty of receiving, the court has no power under section 5 (2) of the Criminal Appeal Act, 1907, to substitute a verdict of Guilty of larceny.

EVANS (1916) 12 Cr.App.R. 8 followed.

SMITH (J. R.) (1923) 17 Cr.App.R. 133 distinguished.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court on October 24, 1952, of receiving stolen goods and were sentenced by the Commissioner, Melvin to three years' and Eden to four years' imprisonment.

The indictment contained counts for warehouse-breaking and larceny and for receiving stolen goods. At about 10.40 p.m. police officers, who had received information about warehouse-breaking and larceny at the offices of British European Airways, Ruislip, earlier that night, were waiting in a yard close to King's Cross. A lorry, in which were travelling the appellants and a third man (who subsequently failed to surrender to his bail) drew up, and the three men got out. It was subsequently found that the lorry contained three safes and house-breaking tools.

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James Burge for the appellants:

Where a trial has been conducted on the basis that, if any offence is proved, that offence is breaking and entering or larceny, and a count for receiving stolen property has been left to the jury without any proper direction in law on that count, a conviction of receiving must be quashed: LINCOLN (1944) 29 Cr.App.R. 191; CHRIST (1951) 35 Cr.App.R. 76.

[THE LORD CHIEF JUSTICE: The court would like you to deal with the powers of the court under section 5 (2) of the Criminal Appeal Act, 1907.]

The wording of that subsection clearly shows that the court has no power to substitute a conviction of an offence where there has been an acquittal of that offence by a jury. The doubts expressed by the court in HAYWARD (1948) 33 Cr.App. R. 1 were probably due to the ambiguous nature of the report of SMITH (J. R.) (1923) 17 Cr.App.R. 133, which was the only authority cited to the court. The earlier cases of EVANS (1916) 12 Cr.App.R. 8, and FISHER (1921) 16 Cr.App.R. 53, correctly state the law.

Edward Clarke for the Crown:

The decision in EVANS (*supra*) that in a case such as the present the court has no power to substitute a verdict of larceny must be regarded as having been modified by the latter decision in SMITH (J. R.) (*supra*), and the point was expressly left open recently in HAYWARD (*supra*). It is submitted that under section 5 (2) of the Act of 1907 the court has power to substitute any verdict which was open to the jury at the trial.

THE LORD CHIEF JUSTICE: In the opinion of the court these appeals must succeed. In giving that decision the court gives it with the same reluctance that the court expressed in EVANS (1916) 12 Cr.App.R. 8. We cannot distinguish this case from EVANS (*supra*), which we think was rightly decided. I will say a word about another case cited to us in a few moments.

The case against the appellants was this: At about 20 minutes to 11 on the night in question the police, who had

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evidently received information about a serious warehouse-breaking which was being carried out or had been carried out at the offices of British European Airways, Ruislip, were waiting at a yard close to King's Cross. A lorry drove up in which there were three men, two of whom were the appellants and the third a man who afterwards failed to surrender to his bail. The two appellants were in the lorry and so were three safes and house-breaking tools. The evidence showed that it would have taken from 10 o'clock to 10.40 for them to have got from Ruislip where the warehouse was broken into to the place where they were found. When the three men got out of the lorry, they suddenly became aware of the police, and one of them shouted " It is the law." He would not have shouted that unless he knew that the law had been broken, and then the two appellants tried to escape, and afterwards made most damning statements to the police.

No one who reads the evidence and summing-up and realises that the jury by their verdict have at any rate found these two men were on a felonious enterprise that night, because they purported to find them guilty of a felony, could have any real doubt about their guilt. The difficulty is that the prosecution put before the jury the case that the appellants were the persons who broke into the warehouse and drove away with the property, and who were found with the property. Their defence was a defence of alibi, certainly not of a very satisfactory character, but if the jury had believed it, it is difficult to understand how they could even have found them guilty of receiving. But, the case having been presented from first to last as a case in which the appellants were the actual thieves, and the learned Commissioner having summed up the case exceedingly well and carefully on that footing, for some reason or another the jury after a very long retirement came back with a verdict of Not Guilty of breaking and entering but Guilty of receiving. No one had said anything about receiving in this case from beginning to end. The learned Commissioner had, in the course of his summing-up, mentioned

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the charge of receiving, but only for the purpose of telling the jury to disregard it. This is one of those cases of which the court has had much experience in the last two or three years in which, on apparently the clearest evidence that the prisoners are the thieves, the jury come back and say they received the goods. A man cannot receive from himself, and here the case was quite rightly presented by the prosecution as a case of breaking and entering and larceny from beginning to end, and the learned Commissioner having summed up on that basis, no direction at all was given to the jury on receiving. Certainly if a case of receiving had been put forward, it is difficult to see what the evidence of receiving would have been, and at any rate a very careful direction would have had to be given to the jury with regard to the law relating to possession. It would have had to be pointed out to them that if the story of the appellants was in any way true, although the jury might have thought that they were going to help to dispose of the property, Kelly, the man who absconded from his bail, was still there, and that they could not on this indictment have found the appellants guilty of receiving.

The only question that arises in this case is whether this court has power to substitute the verdict of Guilty of breaking and entering and larceny, which, if the jury had thought the appellants were engaged on a criminal enterprise that night, they ought to have found, for the verdict of receiving which they did find. In our opinion the court has no such power. Section 5 (2) of the Criminal Appeal Act, 1907, provides: "Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in

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law for that other offence, not being a sentence of greater severity." In our opinion that section would enable the court, for instance, in a case where a jury have returned a verdict of Guilty of obtaining by false pretences, where the evidence showed that the prisoner was really guilty of larceny, to substitute a verdict of Guilty of larceny; or where a person had been found Guilty of larceny as a bailee, and it was found that he ought to have been convicted of the offence of fraudulent conversion, to substitute a verdict of Guilty of fraudulent conversion. I am only giving those as illustrations of the class of case with which the section is designed to deal. EVANS (*supra*), to which I referred a moment ago, was a case exactly parallel to the present case. In that case there was a count for larceny and one for receiving, and the jury acquitted of larceny. The court said that they could not substitute the alternative verdict because that would be to substitute a verdict which the jury not only refused to find, but on which they acquitted. That must be the explanation of SMITH (J. R.) (1923) 17 Cr.App.R. 133, where the jury returned a verdict of receiving in a case in which the only possible verdict was one of stealing. That case again shows at what curious verdicts of receiving juries do arrive, because there the evidence was that the prisoner had been seen to steal the goods, and yet the jury found him guilty of receiving. Although the Lord Chief Justice (Lord Hewart) during the course of the case referred to it as a verdict the jury refused to find, there is no indication that the jury found a verdict of Not Guilty on the first count in the indictment; they seem not to have found a verdict at all on that. I suppose they simply came back and said to the Recorder that they found the prisoner Guilty of receiving. This court did in that case substitute a verdict of Guilty of larceny for one of Guilty of receiving.

If we could substitute a verdict in this case, we should undoubtedly do so, because the court cannot feel any doubt as to the guilt of the appellants; but the jury having found the

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verdict of Not Guilty of larceny and Guilty of receiving, we are of opinion that the verdict of receiving cannot stand and the court has no option but, with great reluctance, to quash the conviction. There is at the present moment a committee sitting under the chairmanship of Lord Tucker to consider the question of giving this court power to order a new trial, a power the absence of which this court has for many years regretted, in fact ever since the Act came into operation nearly 50 years ago, and this might be a useful case to bring to the attention of the committee. If we had the power to order a new trial, it is a case in which we should do so. As it is, the convictions must be quashed and the appellants are discharged.

Convictions quashed.

Solicitors: Kingsley, Napley & Co., for the appellants; The Solicitor, Metropolitan Police, for the Crown.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CROOM-JOHNSON AND MR. JUSTICE PEARSON

1953
Jan. 20

R. *v.* NORFOLK QUARTER SESSIONS, *ex p.* BRUNSON

Committal for Trial—Validity—Alleged Incompetent Witness Called Before Justices—Effect of Admission of Inadmissible Evidence Indictable Offences Act, 1848 (11 & 12 *Vict. c.* 42), *s.* 17.

As long as justices have taken depositions in accordance with section 17 of the Indictable Offences Act, 1848, a committal for trial is good even though the justices have admitted evidence which was inadmissible in law or have heard the evidence of a witness who was not competent to give evidence.

GRANT AND OTHERS (1944) 30 Cr.App.R. 99, and SHARROCK AND OTHERS (1947) 32 Cr.App.R. 124, not followed.

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R. *v.* NORFOLK QUARTER SESSIONS, *ex p.* BRUNSON

Goddard L.C.J., Croom-Johnson J., Pearson J.

Application for orders of mandamus and certiorari.

On May 24, 1952, a motor-car, which had been stolen earlier in the month from barracks at Colchester, was found at a garage owned by Harry Fletcher ("the defendant") near Thetford, Norfolk. The Norfolk police arrested the defendant and his son, Michael Robert Fletcher, and handed them over to the Essex police in custody. The superintendent of police at Colchester admitted the defendant and his son to bail, on their entering into recognisances to present themselves at the police station, if required. Later he gave them notice that their recognisances were at an end and that their presence at the police station would not be required. Subsequently an information was preferred by Brunson ("the prosecutor"), an officer of the Norfolk police, against the defendant, who was brought before examining justices at Thetford. No charge was made against the defendant's son, who was called as a witness for the prosecution. The defendant was committed for trial at Norfolk Quarter Sessions. At the hearing on July 30, 1952, counsel on his behalf submitted that the committal for trial was unlawful on the ground that defendant's son was an incompetent witness, as there was still a charge pending against him, which had not been disposed of, in respect of the car. Quarter sessions accepted that submission and quashed the indictment and awarded a sum by way of costs to the defendant. The prosecutor obtained leave to apply for an order of certiorari to quash the order of quarter sessions quashing the indictment, and for an order of mandamus requiring quarter sessions to hear and determine the case against the defendant.

Gerald Howard, Q.C., and *F. Keysell* for the applicant:

No charge was pending against the defendant's son and he was not, therefore, an incompetent witness; but in any event WINSOR (1865) L.R. 1 Q.B. 289, 390, is an authority of the Court of Exchequer Chamber, upholding a decision of the Court of Queen's Bench, for the practice followed before the magistrates in the present case, and in so far as the decisions in

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R. *v.* Norfolk Quarter Sessions, *ex p.* Brunson

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Grant and Others (1944) 30 Cr.App.R. 99, and Sharrock and Others (1947) 32 Cr.App.R. 124, which were decisions of judges on circuit, are inconsistent with Winsor (*supra*), they should not be followed. Gee and Others, 25 Cr.App.R. 198; [1936] 2 K.B. 442, is clearly distinguishable from the present case, because in that case there had been a direct contravention in the magistrates' court of the provisions of section 17 of the Indictable Offences Act, 1948, with regard to the taking of depositions.

Adrian Head for the defendant.

The decisions of Grant and Others (*supra*), and Sharrock and Others (*supra*) are direct authorities for the proposition that, if an incompetent witness gives evidence before the magistrates, the committal is thereby invalidated, and they should be followed. A witness is incompetent if a charge against him has not been disposed of.

Lionel Thompson for the justices of quarter sessions.

The Lord Chief Justice: In this case Mr. Howard moves first for an order of certiorari to bring up and quash an order made by the Norfolk Quarter Sessions on July 30, 1952, and, secondly, an order of mandamus directing them to proceed with the trial of an indictment preferred against one Harry Fletcher.

The circumstances of this case, to say the least of it, are unusual, and Mr. Head's courageous argument which succeeded before the court below has been repeated here, and if we gave effect to it I tremble to think what would be the result to the criminal practice of this country. It would certainly be suggesting matters which, as far as I know, have never been the law, and suggesting points which, in all the years I have been in the profession, have never been adumbrated.

The position is this: in May, 1952, an Austin motor-car was stolen from some barracks at Colchester. The next that was known about that car by anybody in authority was that on May 24 it was at a garage somewhere near Thetford, owned by Harry Fletcher, the defendant in this case. The Norfolk

police made inquiries about it, and Fletcher's account was such that they had very good ground for arresting him. They not only arrested him but also arrested his son, who was suspected by them of having been concerned in the theft with his father. They were then both handed over to the Essex police. They were then taken to Colchester Police Station, and there is no doubt they had been taken into custody for this particular offence without warrant, the police having reasonable grounds for suspecting that a felony had been committed and that the persons arrested had committed it. At Colchester the superintendent of police exercised his powers and his duty under section 22 of the Criminal Justice Administration Act, 1914, and section 45 of the Criminal Justice Act, 1925, and bailed the two men. Section 45 of the Act of 1925 provides: "If, on a person being so taken into custody as aforesaid"—that is, without a warrant—"it appears to the superintendent, inspector or other officer aforesaid that the inquiry into the case cannot be completed forthwith, he may discharge the said person on his entering into a recognisance, with or without sureties for a reasonable amount, to appear at such police station and at such time as is named in the recognisance, unless he previously receives notice in writing from the officer of police in charge of that police station that his attendance is not required, and any such recognisance may be enforced as if it were a recognisance conditioned for the appearance of the said person before the court of summary jurisdiction"; in other words, he is not told to appear before a court of summary jurisdiction, but he is told to go to the police station unless he is informed that he need not, the object being to enable the police to make further inquiries into the case and decide whether they are going to bring the person arrested before a court or not.

In this particular case the Essex police decided not to go on with the case. They therefore gave notice to both Harry Fletcher and his son that their recognisance was at an end, and that their presence at the police station was no longer

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required. Thereupon, so far as the Essex police were concerned, there was an end of the matter. Subsequently Harry Fletcher was arrested, as I understand, by the Norfolk police. An information was preferred against Harry Fletcher which resulted in his being brought before the examining justices at Thetford. No charge was then made before those justices against young Fletcher. So far as he was concerned, the matter was over, but Harry Fletcher was called as a witness before the justices at Thetford. The father was then committed for trial and at Norfolk Quarter Sessions Mr. Head took the point that the committal was bad. He alleged that Harry Fletcher was an incompetent witness because there was still a charge pending against him, and that, therefore, he could not be called as a witness before the justices and that, as the justices had heard him, the committal was bad.

It is not necessary for us in this case to decide whether a charge had been preferred against Harry Fletcher or not, but I am clearly of opinion that no charge had been preferred which made it improper for him to be called as a witness in the case. There was no charge; he had been taken into custody and released on bail, and the police had told him that he need not surrender. But this case is of great importance, because if we had to give effect to this submission and uphold the Norfolk Quarter Sessions it would, as far as I can see, mean that if any inadmissible evidence is given before justices on committal when they are acting as examining justices, that vitiates the committal. It is true that a judgment given on circuit by Birkett J.—GRANT AND OTHERS (1944) 30 Cr.App.R. 99—when he had not had the opportunity, I should imagine, of as full an argument and of cases being cited as we have had, seems to have been to that effect, and his judgment was followed by Lewis J. in another case on circuit—SHARROCK AND OTHERS (1947) 32 Cr.App.R. 124. But just consider what it means. If a committal is to be vitiated because an incompetent witness has given evidence, which means that the evidence has been wrongly admitted, it would follow that a committal could

always be objected to if it could be shown that there was something on the depositions which could not be legally admitted as evidence. It is really a very revolutionary submission. I think GRANT'S CASE (*supra*) is perhaps to be explained by the fact that Birkett J. strongly disapproved of what had been done in that case, and thought that the witnesses who had been called had very probably been called in a way that was unfair, or it might have been that they were put in the position of having to incriminate themselves. It is interesting to notice that Mr. Howard has called our attention to WINSOR'S CASE (1865) L.R. 1 Q.B. 289, 390, in which it was expressly decided by a court of the highest authority—the Exchequer Chamber, upholding the decision of the Queen's Bench—that if two people are indicted together, although it is an undesirable practice and I have no doubt nowadays it would never be allowed, there was nothing in law to prevent the Crown calling one prisoner as a witness for the Crown though the proceedings against him had not been determined. It may be that the Criminal Evidence Act, 1898—I am not saying it has—has put difficulties in the way of that case being followed, but we need not consider that, because I am willing to admit for the purposes of this argument that Michael Fletcher could not have been called. He was called before the justices. His depositions were taken. It may well be that at the trial objection could have been taken to his evidence, but the words of section 17 of the Indictable Offences Act, 1848, are: "In all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence . . . such justice or justices, before he or they shall commit such accused person for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who should know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over and signed . . . by the witnesses

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who shall have been so examined. . . ." As I ventured to say during the argument, the history of that section is that for the first time it took the place of the statutes which were passed as long ago as the reign of Philip and Mary regulating the procedure before justices. There were two statutes, one dealing with bailable and the other dealing with non-bailable offences. In those days the duty of a justice when a person appeared before him charged with an offence was, first of all, to examine the prisoner, which, of course, cannot be done now. He examined the prisoner and reduced what he could get out of him into writing. Then, but not in the presence of the prisoner—that was never allowed—he examined any witnesses or people, to use the language of the Act, "persons," who should know the facts and circumstances of the case. Having taken their statements, which were no doubt in those days referred to as depositions but which, of course, were not the same as depositions at the present time, he sealed them and sent them with a writ of *mittimus* to be used at the assizes, and one of the principal pieces of evidence was what the justice had got out of the prisoner. Those statutes remained in force until the Indictable Offences Act (Sir John Jervis' Act), 1848. By that time there was a great diversity of practice among justices in favour of the prisoner, some benches admitting what was said, and so forth, but in 1848 this statute was passed which prescribed what was to be done by committing justices. They were to take the depositions in writing, and that had to be done in the presence of the prisoner, who was entitled to cross-examine. If the provisions of that section are not complied with, then, of course, the committal is bad, and that is what the Court of Criminal Appeal decided in GEE, 25 Cr.App.R. 198, [1936] 2 K.B. 442. In that case, instead of depositions being taken in the way prescribed by the Act, statements had been obtained from witnesses and they were read over in court. Speaking for myself, I think it would be a very good thing if something like that could be permitted by a statute because

it would save an enormous amount of time, but it is not permitted and, as the depositions had not been taken in the manner prescribed by the Act, we held the committal to be bad. But this court has never suggested that because justices in taking depositions may admit some evidence that is not admissible or may hear a witness who, it turns out, is objectionable on some ground or another, that that vitiates the committal. The committal takes the place of the form of presentment by grand jury, and, of course, the grand jury could hear what evidence they liked, or no evidence at all. Now the matter is dealt with by section 2 (1) of the Administration of Justice (Miscellanous Provisions) Act, 1933, which makes a committal by justices equivalent to a presentment by grand jury. Therefore, as long as it is once shown that justices have acted in accordance with the Indictable Offences Act, 1848, the committal is good. Whether the evidence that has been given before the justices will be admitted at the trial is quite another matter.

If we gave effect to the argument which has been advanced in this case, or if we followed or did not disapprove of the case of GRANT AND OTHERS (*supra*) and the case of SHARROCK AND OTHERS (*supra*), to which we have been referred and which, after all, are only decisions given on circuit without the advantage of the full argument which we have had, it must follow, it seems to me, that any inadmissible evidence given before justices, that is to say, any evidence which the court of trial comes to the conclusion is inadmissible, would vitiate the whole committal, because I cannot see the difference between the admission of evidence of a witness which is objectionable or an objectionable witness giving evidence, and by " objectionable " I mean a witness who is incompetent. Of course, there are incompetent witnesses at the present day. I instanced a case in argument which we recently had in the Court of Criminal Appeal—BOUCHER (1952) 36 Cr.App.R. 152—in which a wife had been called to give evidence against her husband on a charge of larceny, and we quashed the conviction

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although objection had not been taken in the court below. We quashed it on the ground that the evidence of the woman was evidence by an incompetent witness. She had also given evidence before the justices, but no one had suggested that the committal was bad.

It is enough to say that there was no ground for objection to the committal in this case and there was no ground upon which quarter sessions could have refused to try the indictment. Their order quashing the indictment was wrong and must be quashed, as must their order giving costs to the defendant, and mandamus must issue directing them to hear and determine the case.

CROOM-JOHNSON J.: I am of the same opinion. If the argument which has been advanced is right and if the committal was bad, it has been pointed out that that does not mean that the prisoner of necessity gets free. Quarter sessions can in a proper case send the matter back to the justices to hear evidence in accordance with the statute under which the committal takes place. I cannot see, speaking for myself, that there is anything in any evidence which the younger Fletcher might have given if called on to give evidence at the trial at quarter sessions which could be said to be inadmissible evidence. However, I need not put it as high as that. It seems to me that the mere circumstance, on which proper emphasis has been laid by Mr. Head, of what happened at the time when he was released by the superintendent of police cannot in the least affect his competence to give evidence. Whether it was desirable that he should be called to give evidence is a wholly different matter. It is true that, subject to certain safeguards, a prisoner on trial is not permitted to give evidence as against a fellow prisoner unless it is clearly established that the proceedings against him have come to an end either by his being acquitted or by pleading Guilty and being dealt with by the trial tribunal. I am quite at a loss to understand how Michael Fletcher in the circumstances of this case was in the least incompetent as a witness. If this matter proceeds, no doubt

the question whether he can be called as a witness for the prosecution will have to be considered, and considered in accordance with the usual practice but, so far as this attempted short-cut, for which I suppose Mr. Head is responsible, is concerned, all I can say is that, as very often happens when you embark upon a short-cut, it is very often the longest way round. I agree with the judgment proposed by my Lord.

PEARSON J.: I also agree with the judgment proposed, and I agree with the reasons given by my Lord in this case. I would only like to say that, to my mind, the short point here is that it is not shown that there was any infringment in the taking of the depositions of the provisions of section 17 of the Indictable Offences Act, 1848. The requirement there is that the justices shall take the statements on oath or affirmation of those who should know the facts and circumstances of the case. That wording, especially having regard to the history of the section which has been described, seems to me very different from other wording, which might have been inserted, that they should take the evidence in accordance with the rules of evidence of only such witnesses as would be admissible according to the rules of evidence at the trial. The present wording contemplates, to my mind, a much less formal inquiry than that. The object of the section is the taking of the depositions of those who should know the facts and circumstances of the case, and it is not in the least established here that there was any infringement of that provision.

The second observation I want to make is that I thought Mr. Head's argument might depend to some extent on definite meanings which might be given to the word "charged." The prisoner may be in a sense charged at the moment when the policeman arrests him without warrant on suspicion of felony, and there is some obligation to inform the arrested person for what he is being arrested. That might be in some sense described as putting him on charge. Then there may be further action taken by the police at the police station in accordance with the ordinary usages of the police, but it does

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not in the least follow that what happens at those earlier stages makes the man charged in the most relevant and material sense of an information having been laid against him so that the proceedings against him in court or in connection with the court have at that stage been started. I am not satisfied that he can be said to be charged in any sense material for the purposes of this case until an information has been laid. As I have said, I agree with the first judgment that has been given, and therefore I agree that the orders should issue.

Orders of certiorari and mandamus.

Solicitors: Ford, Michelmore, Rose & Binning, for D. E. Rudling & Co., Thetford, for the applicant; Peacock & Goddard, for Reed, Wayman & Walton, Downham Market, for the defendant; Sharpe, Pritchard & Co., for H. Oswald Brown, Norwich, for the justices.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CROOM-JOHNSON AND MR. JUSTICE PEARSON

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JOHN JAMES DAVIES

Evidence—Previous Conviction—Charge of Receiving—Another Count Included in Indictment—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 43 (1).

By section 43 (1) of the Larceny Act, 1916, "Whenever any person is being proceeded against for receiving any property knowing it to have been stolen . . . for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings . . . (*b*) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty. . . ."

Evidence of a previous conviction under the above subsection is admissible only where the charge is one of receiving

alone; if a count of receiving is tried together with a count charging some other offence, *e.g.*, larceny or being accessory after the fact to larceny, such evidence may not be given.

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Appeal against conviction and sentence.

The appellant was convicted at Bedfordshire Quarter Sessions on September 30, 1952, of receiving stolen goods, and was sentenced by the Deputy-Chairman to eight years' preventive detention.

The appellant appeared before the examining justices on a charge of receiving stolen goods and was committed for trial on that charge. At the preliminary investigation evidence of a previous conviction of receiving, under section 43 (1) of the Larceny Act, 1916, was given. At quarter sessions the indictment as originally drawn was for receiving only, but counsel for the prosecution, before the trial started, obtained leave to add a count charging the appellant with being accessory after the fact to larceny. Evidence of the previous conviction was given by the prosecution. Before the conclusion of the evidence, counsel for the prosecution decided to abandon the count for receiving, and the jury were directed to consider the count for being accessory after the fact to larceny only. The Deputy-Chairman warned the jury to disregard the evidence relating to the previous conviction.

James Burge for the appellant:

Evidence of previous convictions under section 43 of the Larceny Act, 1916, was wrongly admitted. [He was stopped.]

Niall MacDermot for the Crown:

Evidence of previous convictions is admissible under section 43 of the Larceny Act, 1916, even where there are counts in the indictment in addition to a count for receiving, provided that the case disclosed on the depositions is primarily and substantially one of receiving: BALLARD (1914) 12 Cr.App. R. 1. If the jury acquit of receiving but convict upon another count after hearing such evidence, the conviction should be upheld if the jury have been warned, as they were in this case,

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to disregard the evidence of the previous convictions when considering the other count: JONES (J. L.) (1948) 33 Cr.App.R. 33; [1948] 1 K.B. 194. Juries are often told to disregard evidence admissible on one count when considering another, even where it is very damaging, *e.g.*, incriminating statements made by a co-defendant. No objection was taken to the admission of the evidence by counsel for the defendant and no application was made by him for the jury to be discharged. In these circumstances the point should not be open to the appellant, on the analogy of the rule in cases where such evidence has been admitted inadvertently: WATTAM (1941) 28 Cr.App.R. 80.

At the conclusion of the arguments the Lord Chief Justice said that the conviction would be quashed and that the court would give the reasons for its decision at a later date.

January 26.—The following judgment was read by THE LORD CHIEF JUSTICE: The appellant in this case was convicted before the Deputy-Chairman and other magistrates at Bedfordshire Quarter Sessions of being an accessory after the fact to larceny. The court has already quashed the conviction and now proceeds to give reasons for the judgment.

In view of the course which the appeal took it is only necessary to state the facts very shortly. They are that a man named Cobb stole a headlamp and a six-volt battery and took them to a café of which the appellant was the manager. Subsequently the appellant was found in possession of these goods and endeavouring to sell them. He was accordingly charged with receiving them knowing them to have been stolen. On that charge he was brought before examining magistrates and the prosecution tendered evidence under section 43 (1) of the Larceny Act, 1916, of a previous conviction for a similar offence. This was proved by a police officer and was included in the depositions. The appellant was committed for trial on a charge of receiving only, and the indictment as signed contained only that count. Before the arraignment, however,

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counsel for the prosecution applied for leave to amend by including a count charging the appellant with being an accessory after the fact to larceny. His object in so doing was because he felt that there would, or might, be a difficulty in proving that at the time when the appellant received the goods he knew they were stolen; and as it turned out, counsel's doubt was seen to be well founded. The evidence showed that the appellant was not at the café when the goods were left there. There is nothing to show that he knew that they were stolen when he first took possession of them; he did not become aware that they had been stolen until a later date and, eventually, the count for receiving was abandoned by the prosecution and on it a verdict of Not Guilty was returned.

Before the court gave leave to amend, the Deputy-Chairman asked the defending counsel if he had any objection to the amendment, and he said that he had not, although, in our opinion, as will be seen from the rest of this judgment, if given at all, leave ought to have been given only on condition that evidence of the previous conviction was not given. The attention of the Deputy-Chairman was called to JONES (J. L.) (1948) 33 Cr.App.R. 33; [1948] 1 K.B. 194, a case in which the prisoner was charged both with receiving and being an accessory after the fact to the larcenies, and in that case a previous conviction against the appellant of factory-breaking with intent was given in evidence. The jury in that case acquitted on receiving and convicted on the counts for being an accessory. This court quashed the conviction but not on the ground of the reception of that evidence. In giving judgment Humphreys J. pointed out that advantage had been taken by the prosecution of section 43 and that they had proved the previous conviction and said (33 Cr.App.R. at p. 40): "This evidence was receivable for the purpose of proving guilty knowledge on the charges of receiving. There was no specific direction to the jury that they must disregard it when considering the charge of being an accessory. It would certainly have been better that the jury should be so directed, but as they acquitted the

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appellant upon the receiving counts to which it specifically related, we think it unlikely that it affected their minds upon the other counts." It was apparently contended before quarter sessions, as it was before us, that this was an authority showing that, where there was a charge of receiving and also a charge of being an accessory after the fact, evidence of a previous conviction could be admitted, provided a warning was given to the jury that on the accessory counts they must disregard the evidence of the previous conviction, and it is only right to say that in his summing-up the Deputy-Chairman did give a strong direction to the jury to this effect. At the same time the passage that I have quoted in the judgment was *obiter* and I think we may say without any disrespect that the court was not directly considering the admissibility of the evidence where there was a charge of being an accessory after the fact, because they quashed the conviction on quite different grounds.

It is perhaps curious that there is not more authority on this point and indeed the only other case which affords any assistance is BALLARD (1914) 12 Cr.App.R. 1. In that case there were counts for stealing and receiving. Objection was taken to evidence of a previous conviction on the ground that, though there was evidence on the stealing count, there was none on the receiving count and therefore the evidence could not be admitted. In giving judgment the court said (at p. 4): "The section has to be carefully administered, no doubt, and ought not to be used where there are counts for both stealing and receiving for the purpose of getting a verdict on the count for stealing, where the court cannot exclude the evidence as there is a count for receiving; it might induce the jury to convict of stealing on very slight evidence. So if the charge is substantially one of stealing, and not receiving, the evidence ought not to be given." The judgment goes on to say: "but the Chairman held that he could not say that the substantial charge was one of stealing, so he felt bound in law to admit the evidence. The court think that he was right in that view. The jury found the prisoner guilty of receiving only." In our

opinion, that case shows the true rule. If the case is substantially one of receiving and is presented to the jury on that footing so that they are not being asked to find a verdict on some other count, evidence of a previous conviction may be admitted. At the same time it cannot be admitted where there is another charge on which a verdict is sought, and we think that the only right rule to lay down is that if the prosecution feel that they cannot confine their case to one of receiving but must also rely on some other count, be it of stealing or of being an accessory after the fact to stealing, then, if they include in the indictment a count for either of those offences, they must refrain from giving evidence of previous convictions. The statutory provision, which originally appeared in the Prevention of Crimes Act, 1871, is in itself a great departure from the ordinary rules which apply to evidence in criminal trials. As is well known, evidence of bad character or previous convictions is not admissible in chief in any other case, and we need not consider the cases in which it may become admissible by way of rebuttal owing to the prisoner putting his character in issue. It is evidence of a most prejudicial kind and is only allowed in receiving cases because the legislature no doubt recognised the difficulty which often arises of proving guilty knowledge in receiving cases. In the opinion of the court, it must be restricted to those cases. We can well understand that counsel for the defence as well as the Deputy-Chairman may have felt a difficulty in objecting to the evidence because of the passage which I have read in JONES (J. L.)'s CASE (*supra*), but the fact that counsel did not in these circumstances take objection to such evidence ought not, we think, to be regarded as fatal to the appeal.

As we have already said, the Deputy-Chairman gave a strong warning to the jury to disregard the evidence, but it was of so prejudicial a character that no warning could really remove it from the minds of the jury. One often has to tell a jury to disregard such matters as the statement which one prisoner makes involving another, but there a jury can often

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see a very good reason for one prisoner trying to throw the blame on another or to see the other does not escape if he himself is being convicted. Here it is not a mere casual or accidental piece of evidence bearing unfavourably upon the accused person's character. It is a case in which a witness was called to prove and did prove a specific conviction. No warning could possibly remove that evidence from the minds of the jury and accordingly the court felt they had no option but to allow the appeal and quash the conviction.

Other points were raised in the notice of appeal on the question whether on the evidence the appellant could properly be convicted as an accessory after the fact. On this we give no decision, as it has become unnecessary to do so; and it follows that there is no necessity to consider the sentence, though the court cannot but be somewhat surprised that a sentence of eight years' preventive detention was passed for being an accessory after the fact to what, after all, was not a serious larceny.

Conviction quashed.

[The court gave the prosecution leave to proceed on two further indictments which had been left on the file.]

Solicitors: Canter, Hellyar & Co., for the appellant; Burgess & Chesher, Bedford, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CROOM-JOHNSON AND MR. JUSTICE PEARSON

DEREK TALBOT

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Sentence—Corrective Training—Not to be Followed by Imprisonment—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 (1).

A sentence of imprisonment to start on the conclusion of a sentence of corrective training should not be passed.

Reference by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907.

The appellant was convicted at Burnley Quarter Sessions on March 31, 1952, and was sentenced to three years' corrective training. On April 22, 1952, he pleaded Guilty at Sheffield Quarter Sessions to driving a motor-vehicle when disqualified for holding a licence and to using a driving licence with intent to deceive and was sentenced by the Recorder to six months' imprisonment on each charge, the sentences to run concurrently with each other but consecutively to the sentence of corrective training. He subsequently petitioned the Home Secretary in respect of his sentence, and the matter was referred to the court under section 19 (*a*) of the Criminal Appeal Act, 1907.

Michael Havers, for the appellant:

It is wrong to pass a sentence of imprisonment to run consecutively to a sentence of corrective training. Special provisions as to the after-care, etc., of persons released from sentences of corrective training are made under Sched. III to the Criminal Justice Act, 1948, and these would be interfered with if a sentence of imprisonment were to follow.

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J. F. Drabble, for the Crown:

It is conceded that the position is difficult from the administrative point of view, but the Recorder was placed in a position of difficulty. The offences to which the appellant pleaded Guilty were serious and the Recorder must have felt that they merited a substantial sentence, and not merely a nominal sentence, as would have been the result if he had ordered these sentences to run concurrently with the sentence of corrective training.

THE LORD CHIEF JUSTICE: This is a matter referred to this court by the Secretary of State under section 19 (*a*) of the Criminal Appeal Act, 1907, which provides that the Secretary of State may "refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted."

The appellant, who has a bad character, was convicted at Burnley Borough Quarter Sessions on March 31, 1952, of shop-breaking and larceny and he received what, in the opinion of the court, was a very proper sentence of three years' corrective training. There were at that time two other charges outstanding against him under the Road Traffic Act, 1930, and, on April 22 he was brought before the Recorder of Sheffield at quarter sessions to answer them. One was the offence of driving whilst disqualified for holding a driving licence, and the other was that of using a driving licence with intent to deceive—he was using his brother's licence and passed it off as his own—and those are two very serious offences. Driving when disqualified is regarded by the legislature as so serious an offence that a person convicted of it is to be sent to prison for a term not exceeding six months unless the court can find some special reason for thinking that a fine will meet the case. Prima facie, therefore, a person convicted of that offence is to receive a sentence not exceeding six months. The offence of using a driving licence with intent to deceive, which is almost equivalent to an offence of forgery, is punishable by a maximum

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sentence of two years' imprisonment, and the Recorder, hearing that the appellant was already serving a sentence of three years' corrective training, passed concurrent sentences for those two offences of six months' imprisonment to take effect at the conclusion of the period of corrective training.

This case throws into strong relief the difficulties which arise from the new forms of sentence which Parliament has provided for in the Criminal Justice Act, 1948. In providing that in certain circumstances corrective training can be imposed instead of imprisonment, the Act has laid down certain conditions precedent which are to be fulfilled, such as giving notice of intent to prove previous convictions and matters of that sort. By section 21 (1) sentence of corrective training can only be passed where a person "who is not less than 21 years of age (*a*) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and (*b*) has been convicted on at least two previous occasions since he attained the age of 17 of offences punishable on indictment with such a sentence." It follows that a person cannot be sentenced to corrective training for driving when disqualified because that is not an offence punishable with two years' imprisonment on indictment, but he can be sentenced to corrective training for using a driving licence with intent to deceive. But he can be sentenced to corrective training for that offence only if the appropriate notices have been served and it is shown that he is a person with the necessary previous convictions.

This court has already said that it appears to it undesirable that, where a person has been sentenced to corrective training, the sentence should be followed by a sentence of imprisonment for another offence. Corrective training is a substitute for imprisonment to this extent, that the prisoner serves his sentence in prisons specially set apart for the purpose. The discipline is different from that of a prisoner undergoing an ordinary sentence of imprisonment and attempts are made to teach the man a trade or inculcate habits of discipline and regularity. Different considerations follow with regard to what

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is to happen to him when his sentence is at an end. The court which passes a sentence of corrective training does not make an order under section 22 of the Criminal Justice Act. There are automatic consequences which follow—I say "automatic" because they are laid down in a Schedule to the Act—and the prisoner becomes liable to the provisions of the Schedule as soon as he is discharged. He is under different conditions of after-care and so forth.

Now what is to be done? The Recorder had to pass a sentence of imprisonment for driving when disqualified, and he thought, quite rightly, that the offence of using the driving licence with intent to deceive also deserved a sentence but, as the notices had not been served, he could not sentence the appellant to corrective training. If the notices had been served, I think the Recorder could have increased the sentence of corrective training, in effect, from three years to four years by passing another sentence of two years' corrective training to take effect after the period during which the appellant was serving his first sentence, which would have kept him in corrective training for the maximum period of four years instead of three years. It is only fair to the appellant to say that that is what he asks should be done, but it cannot be done because of the various steps which have to be taken and have not been taken.

The court has more than once expressed the hope that in the future, when this Act of 1948 comes to be amended, as it no doubt will as various difficulties are seen to arise, perhaps some alteration will be made with regard to sentences of corrective training, and that courts will not be hampered quite in the same way in which they are now in passing these sentences, which are only passed in the hope that they may be of benefit to the prisoner. If we were empowered to do so, we think this would be a very proper case in which to say that the sentence of corrective training should be increased from three years as originally passed at Burnley to four years, so that the extra year would be served for the offence dealt with at

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Sheffield. But, as I have already said, the court cannot do it, and as we have said on a previous occasion, it is undesirable to pass a sentence the effect of which would be that the appellant would cease to undergo corrective training and would undergo imprisonment when he has earned remission or has completed his sentence of corrective training. The court feels, therefore, that the only course it can take is to say that the sentences passed by the learned Recorder of Sheffield—on whom we are not making the smallest reflection—shall be concurrent with the sentence of corrective training, and that in the result the whole sentence must be served as one of corrective training. In other words, the concurrent sentences of imprisonment really have no effect. It is very unfortunate, but that seems to be the only result at which we can arrive on the wording of this Act. Under the Criminal Appeal Act we are entitled to treat this case as one in which the appellant has appealed against the sentence—he has in fact petitioned the Home Secretary who has referred the matter to us—and we will pass a sentence of disqualification for holding a licence to drive a motor-vehicle, which will take effect when the appellant comes out of prison. We have to pass a sentence to take effect from the date of conviction, which was April, 1952. He has been in prison since March, 1952, so that if he earns his remission he will come out in March, 1954, and in our opinion, he ought to be debarred from holding a licence for five years from that period. Therefore, the sentence of disqualification will be for seven years from April 22, 1952.

Sentence varied.

Solicitor : The Town Clerk, Sheffield, for the Crown.

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HAROLD REGINALD BALLYSINGH

Indictment—Larceny—Shoplifting—Articles Taken from Different Places in Large Stores—Each Taking to be Charged in a Separate Count.

Where, in a case of shoplifting, the evidence for the prosecution shows that a number of articles have been taken from different parts of a large stores, the proper course is to make each taking the subject of a separate count for larceny.

Where, however, in such a case all the articles alleged to have been stolen were included in one count, and defending counsel had not objected to the form of the indictment, having been told by counsel for the prosecution before the trial that, if he did object, leave to amend the indictment would be sought so as to charge each article separately.

Held, that the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied and the conviction affirmed.

Appeal against conviction.

The appellant was convicted at Birmingham Quarter Sessions on September 30, 1952, of larceny and was fined £50 by the Recorder.

The appellant occupied an important legal position in the British West Indies. The case against him was that in September, 1952, while on leave in this country, he visited Lewis's Stores in Birmingham and there carried out a small campaign of common shoplifting. He had £89 in his possession when arrested. He went from department to department, not knowing that he was being followed by detectives, and there

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was a considerable body of evidence of detectives and of shop-assistants. He was seen to pick up a brass tray here and a smoker's knife there, and in another department, after selecting and paying for three cushions, he picked up another and put it under his raincoat.

The indictment contained one count only for larceny, which charged the appellant with stealing "one brass ash-tray, one rubber cushion, one pipe knife, and a cardboard carton containing six glasses, the property of Lewis's, Ltd."

G. D. Roberts, Q.C., and *F. H. Lawton*, for the appellant:

The indictment was bad for duplicity, inasmuch as a number of articles alleged to have been stolen on different occasions were included in one count. Each taking should have been made the subject of a separate count, so that the jury could have convicted in respect of one article or acquitted in respect of another. Further, the summing-up did not adequately put the defence before the jury.

A. W. H. Davies, for the Crown, was not called on.

THE LORD CHIEF JUSTICE [after stating the facts:] The first point taken is that the indictment was bad because all the articles were included in one count, the evidence being that all the articles were stolen on the same day, but at different periods. It was not a case of a man going to one place and selecting four or five different articles and then walking out, as the appellant went from place to place. Accordingly, Mr. Roberts has contended that the indictment was bad for duplicity and that each of the articles should have been the subject of a separate count, so that it would have been possible for the appellant to be convicted in respect of one and acquitted in respect of another. That is perfectly true and the court is of opinion that technically it would have been correct, from the point of pleading, to put each matter in a separate count. The prosecution was conducted by Queen's Counsel and the appellant was defended by one of the best known Queen's Counsel

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on the Midland Circuit [Mr. A. P. Marshall, Q.C.]. The court has been informed that, before the trial started, the appellant's counsel was told by the counsel for the prosecution that, if he objected to the indictment, leave would be asked to amend it by putting each of these items into a separate count. Mr. Marshall said that he did not require it and that he would deal with the case as a whole.

Where it has been shown that both counsel agreed that an amendment to an indictment was not necessary, and the defendant's counsel agreed to fight the case on an indictment as it stood, it would be a very serious matter, and would reduce the law to a matter of technical absurdity if the appellant could now come to this court and ask the court to set aside the verdict and judgment on the ground that there ought to have been separate counts. If authority is needed for this court refusing to entertain such a point as that, I need only refer to THOMPSON, 9 Cr.App.R. 252; [1914] 2 K.B. 99. Exactly the same point was taken in that case. No application was made to quash the indictment, but that of itself is not fatal, because there might be a case in which the prisoner was unrepresented and would not know the niceties of criminal pleading. The court further pointed out that, though the point might be taken in arrest of judgment, it could also have been raised by writ of error, though I confess I can see certain difficulties in that course. The Lord Chief Justice (Sir Rufus Isaacs) said, in giving the judgment of the court dismissing the appeal in that case (at pp. 260 and 104 of the respective reports): "If we had thought that any embarrassment or prejudice had been caused to the appellant by the presentment of the indictment in this form, we should have felt bound to quash the conviction, whatever our views might be as to the merits of the case. It must not be thought that we are deciding that such objections should not be allowed to prevail either at the trial or in this court. An indictment so framed might undoubtedly hamper the defence, and if it did we should give effect to the objection." The court applied the proviso to section 4 (1) of the

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Criminal Appeal Act, 1907, in that case, because they were of opinion that there was no prejudice or embarrassment to the defence.

Who is in a better position to judge prejudice and embarrassment than defending counsel? In view of the defence he was putting up it was obvious that the appellant would not be prejudiced; his case was that the charge was monstrous, and that he had never stolen anything—it was simply a blank denial. He said that he had bought the articles, and, in particular, that he had purchased the knife about 10 days before at Winchester. It was impossible to suggest that any prejudice or embarrassment had been caused by the joinder. Although the court is of opinion that the objection is one which could be decided in favour of the appellant, we are clearly of opinion that the case is one in which we should apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. There may be cases in which no agreement by counsel would prevail, but in this case where it is a question whether or not it was embarrassing to try the matters together, no one would be in a better position to judge than counsel. Although it would have been better to have kept strictly to the rules of pleading, it would be quite wrong to give way to the objection, and we accordingly apply the proviso and refuse to quash the conviction on that ground.

The other ground of appeal is that the learned Recorder did not adequately put the defence to the jury. [The learned Lord Chief Justice then referred to the summing-up and said that, in the opinion of the court, the jury were sufficiently reminded of the defence.] In the circumstances, the court sees no ground for interfering with the conviction and the appeal is dismissed.

Appeal dismissed.

Solicitors: Fairchild, Greig & Co., for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LYNSKEY AND MR. JUSTICE PEARSON

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ANDREW JOHN SANDERSON

Witness for Defence—Conclusion of Summing-up—Leave to Call Witness.

At the conclusion of the summing-up application was made to the judge by defending counsel for leave to call a witness whom the defence had intended to call before the close of their case, but who arrived late in court. The judge granted leave, and then delivered a short supplementary summing-up relating to the evidence of that witness.

Held, that, in the particular circumstances of the case, there was no objection to the course followed.

OWEN, 36 Cr.App.R. 16; [1952] 2 Q.B. 362, distinguished.

Application for leave to appeal against conviction.

The applicant was convicted at the Central Criminal Court on November 19, 1952, of wounding with intent to do grievous bodily harm and was sentenced by the Recorder to three years' imprisonment.

A witness whom the defence intended to call had not arrived in court before the close of their case, but arrived just before the conclusion of the summing-up. At the conclusion of the summing-up counsel for the defence applied to the Recorder for leave to call the witness and this was granted. The Recorder then delivered a short supplementary summing-up referring to the evidence of this witness.

No counsel appeared.

PEARSON J.: In this case the application is refused, but there is a peculiar feature in the case in that a Mr. Hall, whom

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it was desired to call as a witness for the defence, did not arrive until a very late stage when the summing-up had been completed or almost completed. After the summing-up, an application was made on the part of the defence that that witness should be called even at that late stage, and the application was granted. The witness was called and the learned Recorder delivered what may be called a short supplementary summing-up with reference to the evidence of that witness.

In OWEN, 36 Cr.App.R. 16; [1952] 2 Q.B. 362, it was held that it was wrong for witnesses to be called for the prosecution after the summing-up, but we think that this case is distinguishable from that case because here that extra leave and liberty was extended to the defence. It is not a course one would wish to be taken often but, on the particular facts of this case, which have been carefully considered, we think that there is no objection to what was done here. The learned Recorder, we think, was fully justified in the unusual course he took in this case. The application is refused.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE GERRARD

JAMES MOORE

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Indictment—Transfer to Another Court—No Indorsement on Indictment—Practice Desirable to be Followed—Criminal Justice Act, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 14 (2), (3)—*Assizes and Quarter Sessions* (*Convenient Court*) *Order*, 1926 (*S.R. & O.* 1926, *No.* 774), *art.* 1 (*d*).

Where an indictment preferred at one court is for any reason ordered to be tried at another court, the remitting

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court is not required either by section 14 of the Criminal Justice Act, 1925, or by the provisions of the Assizes and Quarter Sessions (Convenient Court) Order, 1926, to make any formal indorsement on the indictment. It is, however, desirable in practice that the remitting court should indorse the indictment: "Ordered to be tried at the —— Quarter Sessions [or Assizes]."

Application for leave to appeal against conviction.

The applicant was tried at Dudley Midsummer Quarter Sessions, 1952, on an indictment charging him with obtaining money by false pretences. The jury disagreed and the Recorder made an order that the case should be retried at West Bromwich Quarter Sessions. The Recorder of West Bromwich felt that, for personal reasons, he ought not to try the case, and ordered that the retrial should take place at Worcestershire Quarter Sessions. No formal indorsement was made on the indictment, and on that ground the chairman of Worcestershire Quarter Sessions refused to try it, and sent it back to West Bromwich Quarter Sessions. The Recorder then made an order that the retrial should take place at Wolverhampton Quarter Sessions. The retrial took place there, and the applicant was convicted on January 7, 1953. The Recorder sentenced him to three months' imprisonment, to run consecutively to a sentence of five years' imprisonment which he was already serving.

No counsel appeared.

THE LORD CHIEF JUSTICE: This is an application for leave to appeal against conviction. There is no ground for granting that application, but the court thinks that it is desirable to state what has happened in this case, and to give a ruling or direction to courts of quarter sessions with regard to the practice where an indictment preferred at one quarter sessions is for any reason ordered to be tried at another quarter sessions.

The history of this case is very unfortunate. The applicant was originally indicted at the Midsummer Quarter Sessions for the County Borough of Dudley for obtaining money by false

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pretences. He was tried by the learned Recorder and the jury disagreed. The learned Recorder then made an order for the case to be retried at the West Bromwich Borough Quarter Sessions. According to a note which has been indorsed on the indictment, the Recorder of West Bromwich felt a difficulty about trying this case because he had been concerned professionally on behalf of the applicant on other occasions. He accordingly ordered that the indictment should be tried at the Worcestershire County Quarter Sessions. No formal indorsement was made on the indictment, and when it got to the Worcestershire Quarter Sessions the chairman refused to try the case because an indorsement had not been put on the indictment. Accordingly, he sent it back to West Bromwich, and then the Recorder of West Bromwich sent it to be tried at Wolverhampton, where at last it was tried. It is unfortunate that an indictment should be sent backwards and forwards in this way merely because there has not been an indorsement put upon it.

The court has examined the provisions of section 14 of the Criminal Justice Act, 1925, which is the Act under which, if it is inconvenient or impossible for any reason that a case should be tried at one assizes or one quarter sessions it may be sent for trial to another assizes or quarter sessions, and finds that there is no provision that the court which is remitting the case for trial must indorse upon the indictment an order that it is to be tried at another court. The proper course is for the clerk of the peace to forward all the documents in the case together with the indictment, and then the court where the trial is to take place can be informed that the case has been remitted for trial from the foreign court. The only regulations relating to the section are contained in the Assizes and Quarter Sessions (Convenient Court) Order, 1926, paragraph 1 (*c*) of which provides: "All recognisances, inquisitions, depositions (including exhibits thereto) and documents shall be transmitted to the proper officer of the court at which the person is to be tried or retried; (*d*) any commissions, writs,

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precepts, indictments, recognisances, proceedings and documents may be altered so far as may be necessary for the purpose of giving effect to the said section 14 and to this Order." That statutory rule and order only provides that indictments may be altered so far as necessary for the purpose of giving effect to section 14. Section 14 enables the foreign court to try the case, and there was no reason why, when the matter was before the Worcestershire Quarter Sessions and the court was informed that the indictment had been remitted from West Bromwich, the court of trial in the indictment should not have been altered to the General Quarter Sessions of the Peace for the County of Worcester. That court could have altered it itself. Quarter sessions should understand that neither the statute nor the order compels the remitting court to alter the documents, although no doubt it would often be very desirable that it should put an indorsement on the indictment saying: "Ordered to be tried at such and such a court." When the Worcestershire Quarter Sessions received this indictment, they could have been informed by counsel or the clerk of the peace that it had been received from another quarter sessions, and that the Recorder there had transferred the case, for whatever reason, for them to try. The court could have altered the place of trial in the indictment, which is really the only thing that need be altered, and the case might have proceeded. If that had been done, this case would have been disposed of very much sooner than it has been.

In the circumstances, there is no ground for giving leave to appeal against conviction, and the sentence was one of three months' imprisonment to follow a sentence of five years' imprisonment which the applicant was already serving. He was serving that sentence of five years' imprisonment during the whole of the time within which this indictment was going backwards and forwards, and in the circumstances no harm was done to him. The application for leave to appeal is refused.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE GERRARD

BRIAN EDWARD CLEWER

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Trial—Irregularity—Undue Interruption by Judge—Defending Counsel Prevented from Fairly Presenting Defence—Conviction Quashed.

Conviction quashed in a case where there was evidence entitling the jury to convict, on the ground of undue interruption by the judge, which made it impossible for defending counsel fairly to present his defence.

Appeal against conviction.

The appellant was convicted at Bedfordshire Assizes on October 10, 1952, of forgery and uttering forged cheques, and was sentenced by Hallett J. to three years' imprisonment.

The following statement of the facts is, in substance, taken from the judgment: The appellant was in partnership carrying on a cinematograph theatre business, and cheques drawn on the partnership account had to be signed by both partners. The appellant was admittedly in financial straits, and the charge against him was that he had forged cheques by forging his partner's name under his own, so that it appeared that the cheques had been signed by both partners. There was evidence from which the jury might have inferred that the appellant had been practising imitating his partner's signature. So far as the uttering was concerned, the forged cheques were all sent to creditors to whom the appellant was personally indebted, together with letters in his handwriting saying that they were sent in payment of his account.

The defence was that the cheques had been forged by the appellant's wife, and that he had only written the covering

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letters and had not intended them to be posted before he had received some money.

C. G. L. Du Cann and *Margaret Hallett* for the appellant:

It is conceded that there was evidence on which the jury could convict, but the ground of the appeal is that the trial was conducted in an irregular manner by reason of the frequent interruptions of the judge, which rendered it impossible for the defence to be fairly presented. The interruption of the final speech for the defence was particularly embarrassing.

S. L. Elborne for the Crown:

It is admitted that the interruptions were frequent and embarrassing to the defence, and unless the court is prepared, in view of the strength of the evidence, to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, it seems impossible to support the conviction.

Cur. adv. vult.

March 9.—The following judgment of the court was read by:—

THE LORD CHIEF JUSTICE: This appellant was convicted at the Autumn Assizes for the County of Bedford before Hallett J. on an indictment containing six counts. The first, third and fifth were for forgery of three different cheques, and the second, fourth and sixth were for uttering those cheques knowing them to have been forged. He appealed to this court on the grounds, first, that there was misdirection by the judge on what constituted uttering, and secondly, that the trial was not conducted in a regular or fair manner, so that, in effect, his counsel was deprived of a fair opportunity of placing the defence properly before the jury. It was on the second of these grounds that leave to appeal was given. The court was quite satisfied that there was no misdirection on any point of law, and it is only right to say that the

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judge's summing-up was quite unobjectionable on any point and was perfectly fair. But it is with regard to incidents that took place during the trial that the court has, with some reluctance, come to the conclusion that the conviction must be quashed.

Although the case took a very long time to try, the issues were in fact exceedingly simple: [His Lordship then stated the facts, substantially as set out above, and continued:] Except that the appellant's wife, who was warned that she need not incriminate herself, swore that she was the forger, the case does not appear to this court to have presented any features of difficulty. It would have been quite simple to have pointed out to the jury at the proper time that it was for them first to come to a conclusion whether the appellant or his wife had forged the cheques.

There was certainly evidence which would have entitled the jury to reject the wife's story that she was the forger, but, even if they had accepted it, they would still have had to consider whether the appellant was not a party to the forgery, and in view of the evidence with regard to the uttering, more especially the letters that were written by the appellant and the inherently improbable story that he told in the witness-box about them, there were ample grounds on which the jury could have convicted on both sets of counts.

In presenting the appeal to this court, Mr. Du Cann, who, we desire to say, appears to have conducted the case below with complete propriety, frankly admitted that the evidence was such that the jury could properly have convicted. His complaint was that, by reason of the frequency and nature of interruptions by the judge, he never had an opportunity of putting his defence fairly before the jury. No doubt it is sometimes difficult, when the defence is one that appears to the presiding judge, whether a judge of assize, recorder or chairman of quarter sessions, to be fantastic or devoid of merit, to treat it with the same consideration as he would pay to a defence not marked by those characteristics. At the same

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time, the first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial, and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury. If counsel is constantly interrupted both in cross-examination and examination-in-chief, and, more especially, as in this case, during his speech to the jury, his task becomes almost impossible. The more improbable the defence, the more difficult it is for counsel to discharge his duty to his client adequately, and, provided that he keeps within the bounds of fair advocacy—as it is beyond question Mr. Du Cann did here—it is highly desirable that he should be allowed to do his best in presenting his case, leaving it to the judge to deal with, and maybe to demolish, it in his summing-up.

The court has had the full transcript in the present case and has observed how, from a very early stage, the judge from time to time imputed to Mr. Du Cann that he was setting up defences which in fact, as he assured the judge, he was not; but time and again, both during the evidence for the prosecution and the evidence for the defence, he was interrupted by the judge, who attributed those defences to him.

A more serious matter came up during Mr. Du Cann's final speech to the jury. While he was addressing them, the judge intervened and said that he would like Mr. Elborne, who appeared for the prosecution, to formulate what positive evidence there was that the appellant forged the signatures. Mr. Elborne, albeit with reluctance, as the judge invited him to intervene at that unusual and unfortunate stage, tried to comply with the request. A dialogue took place between the judge and Mr. Elborne in which it was only fair to say that Mr. Elborne had very little chance of formulating the case, and that occupied no fewer than seven pages of transcript.

In the course of that discussion the judge referred once or twice to what he called a "dust storm" raised by Mr. Du Cann. He said: "When I come to sum up, I might or

might not go into all these details which have made this case last into a third day; but I rather think I might not. I regard them very much as a dust storm raised for the purpose of advocacy, mainly by defending counsel, and it is my duty as a judge to get the jury clear of the dust storm to see that they may do justice." Mr. Elborne: "I have no witness who saw anything." Hallett J. said: "I think Mr. Du Cann sometimes thinks I am being offensive to him. I have really been admiring him. I have been watching advocates years and years and even been one myself. There are cases when raising a dust storm and seeing your client escape is the very best advocacy. It requires skill and one sits admiring and watching that skill being asserted; but I am not sure that I am going to get entangled in any dust storm. I am more likely to tell the jury what are the facts they can infer and, if they think it right, that the forgery was done or brought about by this man."

In effect, what Hallett J. was really saying in the presence of the jury was that counsel for the defence was raising false issues, that there was nothing in the defence being put forward, and that he intended to tell the jury so. More than once while the evidence was being given, the judge intervened, though appealed to by Mr. Du Cann not to anticipate or form an opinion about defences which he had no intention of putting forward.

Some of the judge's observations must have indicated to the jury that he himself had come to a conclusion with regard to the case that was adverse to the appellant and that he regarded the defence as devoid of any foundation. As we have already said, when he came to sum up, he summed up perfectly clearly, perfectly fairly, and, as need hardly be said with regard to any summing-up of this learned judge, with meticulous accuracy as to the law, but it does seem to the court that the whole conduct of the case must have conveyed to the jury the idea that the learned judge was completely convinced of the appellant's guilt, and was disparaging the defence which

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Mr. Du Cann was gallantly endeavouring to lay before them. Not only was there that very long interruption of the speech for the defence, but thereafter there were some 15 or 16 further interruptions, and, with all respect to the judge, the court was unable to find, and Mr. Elborne, whose conduct of the prosecution was perfectly satisfactory, did not suggest, that those interruptions were called for by any misstatement of the evidence by Mr. Du Cann.

Issues of fact are under our law entirely the province of the jury. Everyday experience shows that juries sometimes accept defences which appear highly improbable to judges, and which would not be accepted if the decision rested with the judge alone. The prisoner is entitled to have his defence, even the most improbable, put to the jury by his counsel, whose task is rendered impossible if he is constantly subjected to the kind of interruptions that occurred in the present case. Moreover, to have his final speech interrupted for so long a period, and on so many occasions, is a most disconcerting experience, as everyone who has been engaged in advocacy can well appreciate. The court feels obliged to yield to the appellant's contention that the trial was irregular, and that the conviction ought not to stand.

No one would for one moment impute to the judge any desire other than that a righteous verdict should be returned, but if on a full consideration of the case this court comes to the conclusion, as we have, that the defence had not had a fair opportunity, it seems to us that our duty is to quash the conviction, and that in such circumstances it is impossible to apply the proviso.

Conviction quashed.

Solicitors : Sampson & Co., for the appellant; Director of Public Prosecutions.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE PARKER

RICHARD ALBERT JACKSON

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Evidence—Inadmissibility—Reference by Prosecuting Counsel in Opening—Evidence Not in Fact Called.

Evidence—Failure of Prisoner to Give Evidence—Corroboration of Accomplice—Misdirection in Summing-up—Proviso Applied.

The mere mention by counsel for the prosecution in his opening of some evidence which he proposes to call and which would be inadmissible if called, but which is not in fact called, cannot be a ground for quashing a conviction, unless the judge has treated the opening of counsel as equivalent to the calling of the evidence.

It is a misdirection to tell the jury that the failure of the prisoner to give evidence can amount to corroboration of the evidence of an accomplice.

WAUGH *v.* R. [1950] A.C. 203 referred to.

Appeal against conviction.

The appellant was convicted at Staffordshire Assizes on December 11, 1952, of being accessory before the fact to the larceny of a quantity of motor tyres and of receiving the tyres knowing them to have been stolen and was sentenced by Stable J. to four years' imprisonment.

Counsel for the prosecution, in opening the case, referred to a count in the indictment on which the appellant was ultimately acquitted, and said that he proposed to avail himself of the provisions of section 43 of the Larceny Act, 1916, and call evidence with regard to that count to show that within the 12 months preceding the date of the offence other stolen property had been found in the possession of the appellant. The evidence was not in fact called, because on the second day of the trial the judge, after hearing the evidence of the

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thieves, who were called by the prosecution, withdrew that count from the jury. No reference was made by the judge to that matter in his summing-up. The evidence against the appellant on the counts on which he was convicted consisted mainly of that of the thieves.

The appellant did not go into the witness-box, and the judge, after warning the jury of the danger of convicting on the uncorroborated evidence of accomplices, directed them that they were entitled to regard the failure of the appellant to give evidence as corroboration of the accomplices' evidence. The material passage is set out in the judgment.

J. Bussé, Q.C. (*John Ellison* with him), for the appellant:

The evidence of other stolen property being found in the possession of the appellant within the 12 months preceding the offence, which the prosecution were proposing to adduce in reliance on section 43 of the Larceny Act, 1916, was not admissible, because the indictment was not one for receiving alone, but included a count for being accessory before the fact to larceny. The recent decision of DAVIES (*ante*, p. 16) is directly in point. It is true that the evidence was not in fact called, but the mention of the matter in the opening speech of counsel for the prosecution must have had the effect of prejudicing the appellant and the judge did not refer to it in his summing-up. Further, the summing-up was unsatisfactory and at its very end contained a misdirection in law, because the judge directed the jury that they were entitled to regard the fact that the appellant had not gone into the witness-box as corroboration of the evidence of the thieves, who, as the judge had already correctly told the jury, must be regarded as accomplices requiring corroboration. WAUGH *v.* R. [1950] A.C. 203 emphasises the fact that comments on the failure of a prisoner to give evidence must be made with great care, and, even apart from the misdirection with regard to corroboration, the comments which the judge made were unduly adverse to

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the appellant. [He referred also to FEIGENBAUM, 14 Cr.App. R. 1; [1919] 1 K.B. 431, and BLATHERWICK (1911) 6 Cr.App.R. 281.]

G. G. Baker, Q.C. (*J. A. Davies* with him), for the Crown:

Even if the contention that the evidence with regard to the possession of stolen property by the appellant was inadmissible be right, the evidence was in fact never given, and the matter disappeared from the case when the judge ruled that the count on which it was proposed to adduce the evidence should be withdrawn from the jury. No objection can fairly be taken to the comments by the judge in his summing-up on the appellant's failure to go into the witness-box, except for the fact that he referred to this as capable of affording corroboration of the evidence of the accomplices. This, it must be conceded, was wrong, but in view of the overwhelming evidence of guilty knowledge on the part of the appellant, it is submitted that this is a case where the court might apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

J. Bussé, Q.C., replied.

THE LORD CHIEF JUSTICE: The appellant in this case, who obtained leave to appeal, was indicted before Stable J. at the Autumn Assizes for Staffordshire, first for being an accessory before the fact to the theft of a large quantity of tyres, and secondly on seven counts of receiving stolen tyres. He was convicted on count 1, which charged him with being an accessory before the fact, and on three charges of receiving, and on four charges of receiving the jury were directed by the learned judge to return a verdict of Not Guilty, because the witnesses who were called to prove that part of the case, and who in fact had been convicted of being the thieves who stole the tyres in question, entirely broke down in giving their evidence.

There are a variety of grounds on which this appeal is supported, and I am going to deal with one at once because, in the opinion of the court, it cannot arise in this case. Mr.

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Bussé has very properly taken the point on the recent case of DAVIES (*ante*, p. 16) that as there was in the indictment in addition to charges of receiving a charge of being an accessory before the fact to larceny, evidence under section 43 of the Larceny Act, 1916, was not admissible. What happened was this: Mr. Baker, in opening the case to the jury on all the counts in the indictment, referred to the eighth count, which is one of the counts on which the appellant was ultimately acquitted, and said that he was proposing to call evidence to show that quantities of other stolen property had within 12 months been found in the possession of the appellant; but in fact no such evidence was called, because on the second day of the trial the learned judge, after hearing the evidence of the two thieves, withdrew the case from the jury with regard to that count. Therefore, even if the evidence was inadmissible, it was not called. There was merely the statement of counsel for the prosecution that he proposed to call evidence with regard to one particular lot of goods to prove that the appellant had been in possession of other stolen property within 12 months of the alleged receiving. The learned judge did not in summing-up refer to the fact that counsel had in opening made this statement. He told the jury to put out of their minds, so far as they could, anything relating to those counts on which he directed them to find a verdict of Not Guilty; and, in our opinion, that was a very wise course adopted by the learned judge. If he had referred to the fact that counsel, in opening the case and in anticipation that he would be able to call evidence to support the count, had said he was going to call evidence with regard to other stolen property, the more it would have been in the minds of the jury and the harder it would have been for the jury to disregard the learned judge's direction to put it out of their minds.

In any case we could not quash the conviction on the ground that counsel in opening had mentioned some evidence which, if called, would be inadmissible, and there is not the smallest reflection on counsel for mentioning it to the jury,

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because he had no reason to suppose that the witnesses were going to break down. We cannot say that the mere mention by counsel in opening of some evidence which he proposes to lead and which would be inadmissible if called is a ground for quashing a conviction, unless the presiding judge has treated the opening of counsel as equivalent to the calling of the evidence. No such position arose here, and accordingly we do not think that the fact that Mr. Baker mentioned this fact in opening the case to the jury can in any way affect our decision, and we cannot quash the conviction on that ground. Mr. Bussé has strongly relied on certain passages in DAVIES (*supra*). It is enough for me to say with regard to that decision that in some respects it may require in a proper case some further consideration with regard to its extent and the length to which it was intended to go. I do not say more about it in this case because, in our opinion, the matter does not arise, as the evidence was never given. That is enough to dispose of that point.

I now go on to the other points raised in the case. This is one of those cases in which, as so often happens in charges of receiving stolen goods or being accessory to larceny, which very often are closely akin to charges of conspiracy, the evidence that has to be led consists of that of the thieves, and of course their evidence is open to the comment that it is the evidence of accomplices. Therefore, the court always gives the direction to the jury that they must regard that evidence with very great caution and that it is unsafe to act on it unless they can find some corroboration, and then tells the jury that, even though there is no corroboration, they may convict if they are satisfied that the accomplices are telling the truth, but that they ought, if they can, to find corroboration, because that is the only satisfactory way of coming to a decision where the case rests on the evidence of accomplices. But the day has long gone by when this court will quash a conviction merely because it is obtained on the evidence of accomplices, because it is perfectly open to the jury, if they choose, to accept such evidence.

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The difficulty that arises in this case is on the direction that the learned judge gave. Having pointed out and emphasised the danger of acting on the evidence of accomplices and having indicated who might be regarded as accomplices, in commenting on the fact that the appellant had not gone into the box to give evidence, he said: "You, members of the jury, will attach just what weight you think right to that and if you say: 'Well, that, in our view, forms ample corroboration that those thieves were telling the truth, that he has refrained from going into the witness-box because he does not dare; he thinks he will only make matters worse if he does'—if you come to that conclusion—the weight you attach to his silence is entirely a matter for you." That came just at the end of the learned judge's summing-up, and could only, in our view, have been understood by the jury as meaning that the fact that the appellant had not gone into the witness-box might amount to corroboration, if they thought fit to treat it as such. In the opinion of the court, that is not correct. One cannot say that the fact that a prisoner had not gone into the witness-box to give evidence is of itself corroboration of accomplices' evidence. It is a matter which the jury very properly could, and very probably would, take into account but it should be clearly understood that that direction is wrong in law. But this case is one which evidently the jury thought was overwhelming, because after a trial of a day and a half they were out exactly five minutes and came back and returned a verdict of Guilty. The court is of opinion that this is a proper case in which to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, which says that if, in the opinion of the court, the admission of evidence has not caused a miscarriage of justice, the court is then entitled to dismiss the appeal although it decides the point of law in the appellant's favour.

Here is a man who keeps a café. He is found to have been dealing not with two or three tyres, but with a lorry load. What is a café proprietor doing dealing with a lorry load of tyres unless he, at any rate, gives some explanation about it?

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Here he was, faced with the evidence of men who admitted that they were thieves and who had nothing to gain by the evidence they were giving, because they had been convicted and sentenced; and the cross-examination to which they were subjected on the instructions of the appellant went, in the opinion of the court, to show that, if the jury believed the account which the appellant was instructing his counsel to put up, there would be very strong ground for saying that he did have guilty knowledge. That he received the tyres and that they were stolen, there was no question. The only question was whether he knew they were stolen, and the very defence which he was setting up from the cross-examination which he instructed his counsel to make seems to this court to show in the strongest possible way that he must have known that the goods were stolen, quite apart from the positive evidence of the thieves that they had arranged the whole transaction with him. He may not have been interested at first, but he came into the matter afterwards, and he was a party to the stealing of a lorry load of tyres and other tyres as well. Therefore in our opinion, although we cannot approve the learned judge's direction to the jury that they could take the fact that the prisoner did not go into the witness-box as amounting to corroboration, the case was so clear and strong that the jury must have accepted the evidence of the accomplices, and therefore the court thinks it right to apply the proviso.

One other point has been taken by Mr. Bussé, who has put every point very clearly on the part of the appellant, in reliance on the case of WAUGH *v.* R. [1950] A.C. 203, which came before the Judicial Committee. In that case they quashed a conviction on account of the many times that the learned judge in Jamaica referred to the absence of the prisoner from the witness-box. Lord Oaksey, who delivered the advice which the Board proposed to tender to His Majesty, said (at p. 211): "It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence; but the very fact that the prosecution are not

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permitted to comment on that fact shows how careful a judge should be in making such comment. Here the appellant had told the same story almost immediately after the shooting, and his statements to the prosecution witnesses and his statement to the police made the same day were put in evidence by the prosecution. Moreover, his story was corroborated by the finding of the bag of coconuts and the iron tool and by the independent evidence as to the place where the shooting took place. In such a state of the evidence the judge's repeated comments on the appellant's failure to give evidence may well have led the jury to think that no innocent man could have taken such a course."

In that case there was a conviction of murder, and I do not want in the least to appear to be whittling down what their Lordships in the Judicial Committee said on this matter, but, of course, each case on such a point as this must depend on its own facts. Here it was not till he came to the end of his summing-up that the learned judge commented on the appellant's absence from the box. It has to be remembered, among other things, in this case that the charge against the appellant was receiving stolen property, and if ever there is a case in which a prisoner might be expected to give evidence offering an explanation with regard to the offence of which he is alleged to be guilty, that is the case. We cannot say that because the judge commented strongly on the appellant's absence from the box that the comment was in any way unfair. Of course, a prisoner is always entitled to say: "I am going to stand here and say nothing. The evidence against me is so unsatisfactory that it does not call for any answer"; but nowadays, whatever may have been the position very soon after the Criminal Evidence Act, 1898, came into operation—and I regret to say that I have been in the profession long enough to remember the state of affairs when counsel had very great difficulty in deciding whether to call his client or not—everybody now knows that absence from the witness-box requires a very considerable amount of explanation; I need not put it higher than

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that. In view of the evidence in this case, if the appellant had any explanation to give, one cannot doubt that he would have given it.

However, we are asked to say that the learned judge's comment on the absence of the appellant from the box amounted to a misdirection. We are far from saying that we agree with that suggestion. While we think there was a misdirection on the question of corroboration, there was no misdirection or anything that amounted to an unfair comment on the appellant's absence from the box. Accordingly, we dismiss this appeal.

Appeal dismissed.

Solicitors: Gibson & Weldon, for H. Taylor, Town Clerk, Stoke-on-Trent, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE PARKER

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Evidence—Judges' Rules—Prisoner in Custody—No Caution Administered—Confession Admitted by Judge on Basis Rules Not Contravened—No Exercise of Discretion—Summing-up—No Direction that Jury Must be Satisfied Confession Was Voluntary—Conviction Quashed.

Evidence—Confession—Entries in Notebooks of Two Police Officers—Denial of Collaboration—Notebooks Wrongly Withheld from Jury.

The evidence for the prosecution against the appellant on a charge of shopbreaking and larceny rested entirely on a confession by him in the presence of two police officers. The appellant had been requested by the police to go to the police station, had been interviewed by the officers for three-quarters of an hour without being cautioned, and had then made the confession. The judge, being of opinion that there had been

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no contravention of the Judges' Rules and no threat on the part of the police, admitted the confession. He warned the jury that they must be satisfied that the confession was genuine and that they must decide whether the officers had threatened the appellant or not, but he did not specifically tell them that they ought to disregard the confession unless they were satisfied that it was made voluntarily.

Held, that the appellant was at the time when he was at the police station in custody and that, by virtue of rule 3 of the Judges' Rules, he should, therefore, have been cautioned by the police before being questioned; that, in view of the contravention of the Judges' Rules, it would have been open to the judge, in his discretion, to exclude the confession; but that, as he had not exercised his discretion in that respect and had not adequately directed the jury that, before accepting the confession, they must be satisfied that it was made voluntarily, the conviction must be quashed.

The confession above referred to had been recorded by the two police officers in their notebooks, in one case directly after the appellant had been charged, and in the other case an hour later. In answer to cross-examination by counsel for the appellant, both officers denied that they had collaborated in any way in the making of their notes. Counsel requested that the notebooks should be handed to the jury, but the judge declined to allow this.

Held, that, in the circumstances of the case the jury should have been allowed to see the notebooks.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on January 7, 1953, of shopbreaking and larceny, and was sentenced by the Deputy-Chairman to 12 months' imprisonment.

The evidence for the prosecution against the appellant consisted entirely of a confession made by the appellant at a police station in the presence of two police officers. The appellant's premises had been searched under a search warrant by these and other officers and nothing of an incriminating nature had been found. Some days later the officers left a message at the appellant's house asking him to go to the police station. When he arrived there he was questioned by the officers for three-quarters of an hour without any caution

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being administered. The questioning took place in a room with the door closed and the officers agreed that the appellant would not have been allowed to leave if he had wished to do so. He then made the confession, which was recorded by the two police officers in their notebooks, in one case directly after the appellant had been charged, and in the other case about an hour later. The records were almost identical.

At the trial the suggestion was made by the defence that the confession had been extracted by threats on the part of the police officers, and that there had been a contravention of rule 3 of the Judges' Rules by reason of the appellant having been questioned when he was in custody without any caution having been administered. The Deputy-Chairman was of opinion that the appellant was not in custody at the time and that, accordingly, there had been no contravention of the Judges' Rules, and further, that there had been no threat on the part of either officer. He admitted the confession, and in his summing-up told the jury that, before accepting it, they must be satisfied that it was genuine and that it was for them to decide whether there had been any threat on the part of the police. It was suggested to the officers by counsel for the appellant when cross-examining them that the notes in their notebooks recording the confession had been made in collaboration, but this was denied by the officers. Counsel then requested that the jury should be allowed to see the notebooks, but the Deputy-Chairman refused to accede to this request.

P. Crowder, for the appellant:

The Deputy-Chairman was wrong in holding that the appellant was not in custody when he was interrogated. There was clearly, it is submitted, a breach of rule 3 of the Judges' Rules. It is conceded that that fact alone would not render the confession inadmissible in law, but had the Deputy-Chairman been of opinion that there had been a contravention of the Rules, it would certainly have been within his discretion to have excluded the confession and he would in all probability

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have done so. Its admission was all the more serious in this case because it constituted virtually the only evidence against the appellant. Further, the Deputy-Chairman was wrong in refusing to allow the jury to see the police officers' notebooks. One of the issues which the jury had to determine was whether the officers had collaborated in making their notes, and an inspection of the notebooks would clearly have been of assistance to the jury in determining that issue.

Sir John Cameron for the Crown:

Even assuming that the Deputy-Chairman was wrong in his view that the appellant was not in custody when he was questioned by the police officers, the confession was, none the less, admissible in law, provided it was not induced by threats on the part of the police, and on this matter the jury received a careful direction from the Deputy-Chairman. It might have been better if the jury had been allowed to see the officers' notebooks, but the matter was one for the discretion of the Deputy-Chairman; and as defending counsel had inspected them himself, he was in a position to make in his address to the jury any comments which appeared to him proper with regard to the suggested collaboration.

At the conclusion of the arguments the court announced that the appeal would be allowed and the conviction quashed, and that the reasons for the decision would be given later.

Cur. adv. vult.

March 30. The judgment of the court was read by:

BYRNE J.: The court has already intimated that this appeal is allowed and the conviction quashed, and we now proceed to give our reasons.

The appellant was convicted at the London Sessions upon an indictment in which he and two other men, who both pleaded Guilty, were charged with breaking and entering a shop and stealing a quantity of tea, cigarettes and chocolate.

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The case against the appellant rested entirely upon answers he made to questions put to him by two police officers, who interrogated him for about three-quarters of an hour at Paddington Police Station. Those answers amounted to a confession of guilt, but after the officers had been cross-examined and the appellant had given evidence with regard to the circumstances in which they were made, the learned Deputy-Chairman held that they were admissible and that there was nothing improper in the way in which they had been obtained.

A week before the interrogation at the police station, the two officers and two other officers armed with a search warrant had, in the presence of the appellant, searched his house, but had found nothing to connect him with the theft. Some days later, however, in consequence of information which they had received from the appellant's co-defendants and a police informer, the two officers decided to interview the appellant, and it was in response to a message left at his house that the appellant called at Paddington Police Station and the interview took place.

The appellant, with leave of the court, appealed against conviction on two grounds. The first ground is that the appellant's answers to the police officers should not have been admitted in evidence, first, because the circumstances in which they were obtained amounted to a contravention of rule 3 of the Judges' Rules and, secondly, because they were not made voluntarily but as the result of a threat to withhold bail. The second ground of appeal is that the learned Deputy-Chairman was wrong in refusing to allow the jury to see the officers' notebooks. The interview took place in the C.I.D. room at the police station.

Mr. Crowder, who appeared for the appellant in this court, and in the court below, asked Det.-Constable Butler: " (Q.) The truth of the matter was this, was it not, that you had no intention of cautioning him until you had wrung from him the admission you required? (A.) I did not caution him

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until such time as he admitted the offence. (Q.) Exactly. It took you three-quarters of an hour in one room with the door shut? (A.) Yes. We may have discussed something else as well. (Q.) Would you agree that, to all intents and purposes, he was under arrest? (A.) No. (Q.) If he had tried to go, would you have prevented it? (A.) He did not try to go. (Q.) If he had, you would have done? (A.) Yes. (Q.) If he had refused to go to the C.I.D. room you would have taken him there by force? (A.) Yes." There can be no doubt, having regard to that evidence, that the appellant was in custody; that he was questioned without being cautioned, and thus that there was a breach of rule 3 of the Judges' Rules. If the Deputy-Chairman had held—as we think he should have done—that the statement was taken in contravention of the Judges' Rules, it would have been open to him in his discretion to have refused to admit it. On this matter he did not exercise any discretion because, erroneously as we think, he considered the Rules had not been contravened.

That, however, is not an end of the matter, for this court has said on many occasions that the Judges' Rules have not the force of law, but are administrative directions for the guidance of the police authorities. That means that if the Rules are not complied with, the presiding judge may reject evidence obtained in contravention of them. If, however, as VOISIN (1918) 13 Cr.App.R. 89 shows, a statement is obtained in contravention of the Judges' Rules, it may nevertheless be admitted in evidence, provided it was made voluntarily. The principle to be applied was laid down in THOMPSON [1893] 2 Q.B. 12, as approved in IBRAHIM v. R. [1914] A.C. 599. In the latter case, Lord Sumner at p. 609 said: "It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle

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is as old as Lord Hale." It is to be observed, as this court pointed out in MURRAY, 34 Cr.App.R. 203, [1951] 1 K.B. 391, that while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it, if he admits it; and thus, when a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it the principle as stated by Lord Sumner, and he should further tell them that if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it.

Unfortunately, the learned Deputy-Chairman did not give a clear direction to the jury with regard to that aspect of the matter. He told them that they must be sure that it was a genuine confession and that they must decide whether the officers had threatened that the appellant would not be given bail unless he talked, but he omitted to tell them in plain words that unless they were satisfied that it had been made voluntarily they should reject it and—in view of the fact that it was the only evidence against the appellant—acquit him. In one passage of the summing-up he said: "There it is. The chief ground of complaint, it seemed to me, was that the young man was not cautioned earlier. After some 30 years' experience in the criminal courts of this country, there is nothing that I know of to prevent an officer questioning a man in the way that they did; and if I had thought that there was anything improper about it at all, I would not have hesitated for one second to have said so, and I should have ruled that statement out, and that would have been the end of the case. But there it is; it is in and Mr. Crowder has got to admit that it is in, because he has got to accept my ruling," and that was followed by another passage in which he said: "There was a long discussion and talk about the question of comparing notes, the question of whether they were made independently or whether they had been made in concert, and so on. The question of threats was raised; 'If you don't talk, you won't have bail,' and so on. It was put

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to the officers that Bass, when he went into the box, would swear that that threat was made, and it is entirely a matter for you to decide, whether you think that those police officers did utter that threat and that the defendant is telling the truth, or whether you think that the officers are telling you the truth when they deny that any such threat was made. That is essentially a point for the jury; it is entirely a matter for you to consider. If the threats were made, it would be most improper and that would be sufficient in itself to rule out the whole of those statements and I would not have any hesitation in doing it. It is one of those things we will not tolerate in this country, any attempt to extract admissions, 'wring them'—as we have heard with almost monotonous regularity—'Did you wring from him . . . ?' and so on. Do you see any evidence of wringing from anybody? Perhaps 'obtaining' would be a better word and perhaps a more polite word. But there it is. Was there any wringing? Was there any threat uttered or was it just an ordinary questioning of a man who was under certain suspicion? That is what it comes to."

The jury may well have thought, in view of those observations, that they were being asked to decide a matter which had already been decided by the learned Deputy-Chairman. This was a case in which police officers, without any evidence, had interviewed the appellant, and, without first administering a caution, had obtained a confession from him, and that confession was the only evidence that the prosecution had against him. If in the circumstances of this case the learned Deputy-Chairman had, in the exercise of his discretion, refused to admit the confession, we should not have been surprised. As, however, he admitted it, we feel that the vital question of whether it was made voluntarily was not adequately left to the jury.

With regard to the second ground of appeal, the matter stood in this way. The officers' notes were almost identical. They were not made at the time of the interview. One officer

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made his notes after the appellant had been charged, and the other officer made his an hour later. Mr. Crowder suggested to the officers in cross-examination that they had collaborated. They denied that suggestion. This court has observed that police officers nearly always deny that they have collaborated in the making of notes and we cannot help wondering why they are the only class of society who do not collaborate in such a matter. It seems to us that nothing could be more natural or proper when two persons have been present at an interview with a third person than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory.

In view of the denial of collaboration, Mr. Crowder asked the learned Deputy-Chairman to allow the jury to see the officers' notebooks, but he refused, and the following passage occurred: "(Q.) You do not think that there is anything extraordinary—the jury will have the advantage of seeing those notebooks. . . . (The Deputy-Chairman): That is if I allow it Mr. Crowder. I am not disposed to let juries see police officers' notebooks. Sometimes they can obtain matters of the highest confidential nature and I do not encourage it in the least; in fact, I like counsel to refer to only the few pages of the notebook affecting the particular case. I do not like them out of police officers' hands very long. I notice that you have had them in your hands now about half an hour or so. (Mr. Crowder): Is your Lordship suggesting that I will alter them in any way? (The Deputy-Chairman): No. I am suggesting nothing of the sort. I was only suggesting the view I took about police officers' notebooks and I do not like them out of their hands. I have known cases where their notebooks have been taken away with notes that they made many months before and then they cannot remember them and they have been criticised for it. I do not like that. (Mr. Crowder): My Lord, I would submit in this case that those officers, whose notes are the same, have in fact written them.

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. . . (The Deputy-Chairman): I know—that they made them in collaboration. If I have heard that suggestion made once, I have heard it made a hundred times; and my usual comment to the jury is ' Yes, if they collaborate that is wrong; if there is a difference between the two officers' stories or accounts of an interview, that is wrong because there are discrepancies; so we must have the best of both worlds.' That is what I will tell the jury today. I think, if you do not mind, I would like that notebook handed back to the officer. (Mr. Crowder): Certainly. I ask formally that both these notebooks, as they have been used in evidence by the officers, be exhibited as exhibits in this case. (The Deputy-Chairman): Well I refuse. I want them handed back to the officers as soon as possible." Thereupon the notebooks were returned to the officers.

The learned Deputy-Chairman's desire to preserve the confidential nature of the notebooks could probably quite easily have been achieved with the assistance of a pin or a piece of sticking plaster, so that only the relevant pages could have been read. Be that as it may, however, the jury should have been permitted to see the notebooks. The credibility and accuracy of the two police officers was a vital matter, for it was upon their evidence and their evidence alone that the whole of the case against the appellant rested, and as they had denied collaboration in the making of their notes, the jury should have been given the opportunity of examining them. Had this been the only ground of appeal we might have considered applying the proviso to section 4 (1) of the Criminal Appeal Act, 1907—but, in view of the other matters with which we have dealt, we felt obliged to quash the conviction.

Conviction quashed.

Solicitors: Philip Conway, Thomas & Co., for the appellant; The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE PARKER

JOSEPH HOLMES

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Insanity—Medical Witness—Admissibility of Questions by Counsel.

The appellant, who was charged with murder, raised the defence of insanity. After committing the murder he had gone to a police station, told the police he was giving himself up for murder and described the crime in detail. Medical witnesses for the prosecution and the defence, who had examined the appellant, were agreed that he was suffering from a disease of the mind. The medical witness who was called for the defence was asked in cross-examination by counsel for the prosecution whether the appellant's conduct after the crime indicated to the witness that the appellant knew the nature of the act, and whether his conduct indicated to the witness that the appellant knew that the act was contrary to the law of the land, and the witness answered both questions in the affirmative.

Held, that the questions were admissible in law and that it was proper for counsel to ask them.

Appeal against conviction.

The appellant was convicted at Nottinghamshire Assizes on March 4, 1953, of murder and was sentenced by Streatfeild J. to death.

The appellant, after making an attack of great violence which resulted in the death of the murdered man, went to a police station, told the police that he was giving himself up for murder and gave a detailed account of the crime. At the trial the only defence raised on his behalf was that of insanity. Medical witnesses for the prosecution and the defence, both of whom had examined the appellant, were agreed that he was suffering from a disease of the mind (paranoiac schizophrenia). The medical witness for the defence was asked in cross-examination by counsel for the prosecution: "Would the

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accused's conduct immediately after the incident indicate to you that he knew the nature of the act that he was committing? " to which the witness replied: " Yes," and " Would his conduct immediately after indicate equally that he knew his conduct was contrary to the law of the land? " to which the witness again replied: " Yes."

C. N. Shawcross, Q.C. (*P. D. Cotes-Preedy* with him), for the appellant:

The summing-up of the judge appears at first sight to have been perfectly accurate, but this presupposes that the questions to the medical witness and the answers by him were rightly admitted by the judge. The substantial ground of appeal is that that evidence should not have been admitted. The Court of Criminal Appeal has said over and over again with regard to defences of insanity that it will not allow medical men, of whatever eminence, to usurp the functions of the jury by giving their opinion on the very issue which it is for the jury to decide, namely, whether the prisoner, when he committed the act, knew that what he was doing was wrong in law. A medical man called on an issue of insanity must first be asked whether the prisoner at the material time was suffering from a disease of the mind. If he answers " Yes," he may then be asked whether, in his experience, such a disease would affect a man's judgment on what was right and what was wrong, but he may not be asked to say what, in his opinion, was in the prisoner's mind when he committed the crime. [He referred to McNAUGHTON (1843) 4 St.Tr.(N.S.) 847; FRANCES (1849) 4 Cox C.C. 57; WRIGHT (1821) R. & R. 456; SEARLE (1831) M. & Rob. 75; and RIVETT (1950) 34 Cr.App.R. 87.] So far as the present appellant is concerned, the question may appear to be academic, but the matter is one of general importance and it is desirable that there should be a ruling on it. The admission of the questions and answers in the present case left the jury no issue to try.

George Terrell, for the Crown, was not called on to argue.

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THE LORD CHIEF JUSTICE: The appellant was convicted before Streatfeild J. at the Nottinghamshire Assizes of murder. The case was one in which the appellant set up the defence of insanity, in which, as everyone knows, the onus of discharge is on the prisoner. In the course of the case a medical man, Dr. Woddie, was called to give evidence on behalf of the defence. Both the doctor for the defence and the doctor for the prosecution were agreed upon one thing, and that was that, at any rate at the time of the trial, and probably before, the appellant was suffering from a disease of the mind, a particular form of paranoia.

It is well known that the test of insanity for the purpose of being an excuse for a criminal act according to the answers the judges gave in the MCNAUGHTON CASE (1843) 4 St.Tr.(N.S.) 847, which were adopted by the House of Lords, is whether or not the prisoner knew the nature and quality of the act he was doing. If he did not, that establishes insanity. If he did, the defence must then go further and prove that he did not know at the time that the act was wrong, and wrong according to the decision of this court in WINDLE, 36 Cr.App.R. 85; [1952] 2 Q.B. 826, means contrary to law, not wrong in the region of morals.

In this case the appellant, after a savage attack upon the murdered person, went to a police station, gave himself up, said he was giving himself up for murder and promptly gave a full and detailed account of what he had done and how he had done it. The doctor called for the defence was asked this question: "Doctor Woddie, you remember that I asked you the question whether the accused's conduct immediately after this incident would indicate to you that he knew the nature of the act that he was committing, and your reply was 'Yes.' That is so, is it not? (A.) Yes. (Q.) Would his conduct immediately after indicate equally that he knew his conduct was contrary to the law of the land." The doctor's answer was "Yes."

Mr. Shawcross has submitted that those questions were inadmissible. Whatever fine distinctions may have been drawn in days before or soon after the MCNAUGHTON CASE (*supra*),

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we can only say that no member of the court has ever heard an objection being taken to such questions as those. Moreover, if the objection prevailed, it would put an insuperable difficulty, as it seems to us, in the way of the defence whenever they were trying to establish insanity. If that sort of question was put to a doctor and he was prepared to answer "No," it would be a very great misfortune and a great hardship on a prisoner setting up a plea of insanity if the doctor was not to be allowed to answer the question. It seems to the court that that is essentially a question that may be asked and answered.

Mr. Shawcross has referred to a large number of cases in which the court has set out exactly what is the right question and issue, and he has relied particularly on the judgment of Baron Alderson, who evidently had not approved of the decision in the McNAUGHTON CASE (*supra*), in FRANCES (1849) 4 Cox C.C. 57, where he said: "The proper mode is to ask what are the symptoms of insanity, or to take particular facts, and, assuming them to be true, to ask whether they indicate insanity on the part of the prisoner." When the learned judge is using the word "insanity," he is using the word "insanity" in the sense that it is understood in criminal law as an excuse for crime. Therefore the questions asked in this case fall exactly within what the learned judge says is admissible because the second question, to expand it, amounts to this, "Does the fact that the prisoner went immediately to the police station and gave himself up for murder and wrote out a full description of the crime indicate to you insanity on the part of the prisoner within the McNaughton Rules, that is to say, whether or not he knew what he had done was contrary to law?"

That is quite enough to dispose of this case, and this court does not propose to give a longer judgment or to go into all the cases cited because, in its opinion, the question is quite clear and it would introduce much confusion and injustice to an insane prisoner if we were to give effect to the argument. This appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE PARKER

JOHN PHILLIPS

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Committal for Trial—Charge before Magistrates of Summary Offence —Offence Punishable by More Than Three Months' Imprisonment—Election to Trial by Jury—Indictment—Substitution of Another Offence—Offence Disclosed on Depositions—Perjury Act, 1911 (1 & 2 *Geo.* 5, *c.* 6), *s.* 5 (*b*)—*Administration of Justice* (*Miscellaneous Provisions*) *Act*, 1933 (23 & 24 *Geo.* 5, *c.* 36), *s.* 2 (2)—*Vehicles* (*Excise*) *Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 89), *s.* 9 (1).

The appellant appeared at a magistrates' court charged with offences of making a declaration which was to his knowledge false in connection with an application for a licence of a motor-car, contrary to section 9 (1) of the Vehicles (Excise) Act, 1949. The offence created by that section is a summary offence, but as the maximum punishment is six months' imprisonment, a defendant has, by virtue of section 17 of the Summary Jurisdiction Act, 1879, the right to elect to go for trial by jury, and the appellant did so elect and was committed for trial for those offences. The prosecution, taking the view that offences of making a false declaration, contrary to section 5 (*b*) of the Perjury Act, 1911, were disclosed on the depositions, and in reliance on section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, substituted counts for such offences in the indictment for the offences in respect of which the appellant had been committed for trial, and the appellant was convicted of the offences under the Perjury Act, 1911.

Held, that in view of the fact that each offence for which the appellant was committed for trial was a summary one and triable on indictment solely by reason of the appellant having exercised his right to go for trial, another offence should not have been substituted in the indictment and the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at Buckinghamshire Quarter

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Sessions on January 7, 1953, of three offences under the Bankruptcy Acts and in respect of these he was sentenced by the Deputy-Chairman to 12, 12 and 1 months' imprisonment (concurrently). No point arises in respect of those offences. He was also convicted on three counts of another indictment charging him in each case with making a false declaration, contrary to section 5 (*b*) of the Perjury Act, 1911, and in respect of each of these he was sentenced to terms of four months' imprisonment, these sentences to run concurrently with each other, but consecutively to the sentences imposed for the bankruptcy offences.

With regard to the offences in the second indictment the position was as follows: The appellant had been charged at the magistrates' court with offences of wilfully making a statement false in a material particular in connection with an application for a licence of a motor-car, contrary to section 9 (1) of the Vehicles (Excise) Act, 1949. The offence created by the section is a summary offence, but, as the maximum punishment is six months' imprisonment, a defendant charged with the offence has, by virtue of section 17 of the Summary Jurisdiction Act, 1879, the right to elect to go for trial. The appellant did so elect and was committed for trial for those offences. In the indictment the prosecution substituted for the offences in respect of which the appellant had been committed for trial counts for offences under section 5 (*b*) of the Perjury Act, 1911, which, they contended, were disclosed on the depositions, in reliance on section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, which provides: "Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless " (*a*) the person charged has been committed for trial for the offence. . . . Provided that (1) where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or

deposition taken before a justice in his presence, being counts which may be lawfully joined in the same indictment. . . ."

The appellant in person.

E. Daly Lewis for the Crown:

The prosecution were entitled under section 2 (2) of the Act of 1933 to substitute in the indictment the offences under section 5 (*b*) of the Perjury Act, 1911, as these offences were disclosed on the depositions. It is sufficient for the purpose of the subsection that the offence should be disclosed, and it need not be proved. [He referred to THOMAS (1947) 32 Cr.App.R. 50.]

THE LORD CHIEF JUSTICE: The appellant was convicted before the quarter sessions of Buckinghamshire on an indictment charging various offences relating to bankruptcy. There was also another indictment in which the statement of offence in the first count was: "Making a false declaration, contrary to section 5 (*b*) of the Perjury Act, 1911." The particulars of offence alleged that the appellant "In a declaration made under section 9 (1) of the Vehicles (Excise) Act, 1949, in connection with an application for a licence for a Standard Vanguard motor-car, wilfully made a statement false in a material particular, namely, that the said motor-car had not been previously registered." There were also other counts which charged similar offences in respect of other alleged false statements.

When this case came before the court by way of application for leave to appeal, the appellant did not get leave to appeal on the convictions for the bankruptcy offences. There is no question about the propriety of those convictions, but the court gave leave to appeal on the convictions for making false declarations because we found some difficulty in understanding what had taken place. It was not until the argument today that it became clear what had taken place. The reason why we gave leave to appeal was that it did not appear to us that any false declaration had been proved. We thought then that it

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was a highly technical point and one to which we should have to give effect in favour of the appellant. Now it appears that that is not really the point at all, and a point of much more importance has emerged, on which it is right that this court should express its opinion for the guidance of other courts, where this same point may arise.

Section 9 of the Vehicles (Excise) Act, 1949, provides: "If any person in connection with an application for such a licence makes a declaration which to his knowledge is false or in any material respect misleading, he shall be liable on summary conviction to a penalty not exceeding £50 or to imprisonment for a term not exceeding six months." There is no provision in that section, such as one very often finds in statutes, that a person shall be liable on summary conviction to a certain penalty and on conviction on indictment shall be liable to a more severe penalty. In such cases magistrates can make up their minds whether they will commit the prisoner for trial or not. If they think that it is a serious case, they can commit him for trial; or he can elect to go for trial. As the offence here, though stated to be a summary offence, carries with it a liability to imprisonment for more than three months, under section 17 of the Summary Jurisdiction Act, 1879, the appellant had a right to elect to go for trial. The magistrates could not commit him for trial unless he elected to go for trial because the statute made the offence a summary one, and he was entitled to say: "I will stay where I am and take my trial." In such cases the magistrates would have been bound to try him; but if he elected to go for trial, which he was obliged to do before the case was gone into, the magistrates were bound to commit him for trial if there was a prima facie case, and they could not deal with the matter themselves.

Here the appellant did elect to go for trial in respect of these offences, and he was committed for trial in respect of them. When he got to quarter sessions, he was not indicted for the offences under the Vehicles (Excise) Act, 1949, for which he had been committed for trial. He was indicted for offences

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under section 5 (*b*) of the Perjury Act, 1911, which is, no doubt, wide enough to catch people who have made false declarations. Such an offence, of course, is an entirely different offence, because it is laid under a statute different from the statute relating to the offence with which he had been charged before the magistrates. It may very well be that the evidence to support the charge under the Perjury Act would be the same as the evidence to support the charge under the Vehicles (Excise) Act. Every criminal practitioner knows that there is a provision in section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, which corresponds very closely to the provision in the old Vexatious Indictments Act, 1859 (repealed), which provides that, although magistrates may have committed for certain offences, yet if the evidence on the depositions shows that there is another offence disclosed which can be made the subject of a charge, the court may allow a count for that offence to be added or substituted, though there has not been a committal for it.

Therefore, it is sought to say in this case that, as the depositions showed offences under the Perjury Act, the prosecution were entitled by reason of that provision in the Act of 1933 to prefer those charges, although the appellant had been committed for trial under the Vehicles (Excise) Act. I will assume that that is perfectly right, because the evidence was, as I have said, the same; but this court cannot approve of such a course being taken in this case, because, if it did, it would amount to making the option given to the defendant by section 17 of the Summary Jurisdiction Act, 1879, something in the nature of a trap. A defendant finds himself before magistrates charged with an offence for which the maximum punishment is six months' imprisonment. He says: "As I am charged with an offence for which I am liable for more than three months, I will elect to go for trial before a jury." Instead of charging him with that offence, the prosecution say: "We will charge him with something entirely different," with which, if he had been dealt with by the magistrates he

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could not have been charged. In this case, had the appellant been convicted by the magistrates, and had he not opted to go for trial, he could not afterwards have been prosecuted under section 5 of the Perjury Act. For these reasons this court cannot approve of another charge being substituted for the charge for which the prisoner was originally before the magistrates in any case where quarter sessions only obtained jurisdiction by reason of the prisoner having exercised his option under section 17 of the Act of 1879. As I suggested in the course of the argument, it not infrequently happens that alleged offences under the Merchandise Marks Act, 1887, come before the courts in the first instance as summary offences, but they very often go for trial because the defendant elects to go for trial. In many cases there is a serious dispute with regard to what is a sardine or burgundy or whisky, and matters of that sort, and they go before a jury; but it would not be right, because a defendant has elected under the Merchandise Marks Act to go for trial for that offence, for him to be suddenly faced with charges of false pretences which had not originally been preferred against him.

For these reasons, the conviction on this indictment is quashed, and that means that the appellant will serve four months less.

Conviction quashed in part.
Sentence reduced.

Solicitors: Horwood & James, Aylesbury, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE PARKER

HYWELL RHYS WILLIAMS
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Indictment—Duplicity—Count Charging Larceny of Aggregate Sum —Sums Charged Separately in Other Counts and Additional Sums Included.

Larceny—Definition—"Fraudulently"—Defence of Intention to Repay Money Taken—Larceny Act, 1916 (*6 & 7 Geo. 5, c. 50*), *s.* 1 (1).

Post Office Offences—Sub-Postmaster—Taking of Sums of Money for Which Account in the Aggregate Due—Fraudulent Conversion to be Charged in Preference to Larceny.

A count in an indictment charging the larceny of an aggregate sum of money, composed partly of sums already charged in other counts and partly of sums not elsewhere charged, is bad for duplicity.

The word "fraudulently" in the definition of larceny contained in section 1 (1) of the Larceny Act, 1916, is intended to add, and does add, something to the words "without a claim of right made in good faith"; it means that the taking must be intentional and without mistake, and with knowledge that the property of another person is being taken.

If a person takes someone else's money for his own purposes, and has merely a hope or expectation that he will be able to repay it in the future, that does not amount to a defence to a charge of larceny and can, at the most, go to mitigation.

CARPENTER (1911) 22 Cox C.C. 618 applied.

Per curiam: Where a sub-postmaster has taken for his own purposes from the sub-post office premises sums of money belonging to the Postmaster-General for which he is due to account by paying them over in the aggregate either to some officer of the Post Office or into a bank, it is preferable that he should be charged with fraudulent conversion rather than with larceny of the money.

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Appeals against conviction.

The appellants, who were husband and wife, were convicted at Monmouthshire Quarter Sessions on January 9, 1953, on seven counts of an indictment containing eight counts; on the first count they were convicted of larceny of £40, on the third count of the larceny of £43, on the fourth count of larceny of £100, on the sixth count of the larceny of £544 1s. 1d., which represented the aggregate of the sums charged in the earlier counts and certain other sums, the money in each case being the property of the Postmaster-General. The seventh and eighth counts alleged offences of falsification of accounts. On the second count of the indictment they were acquitted. They were sentenced by the Deputy-Chairman, in respect of the sixth count, the husband to 30 months' and the wife to 18 months' imprisonment, and in respect of the other counts, each to concurrent terms of one, 12 and 12 months' imprisonment.

The wife was sub-postmistress at a village in Monmouthshire, and her husband carried on a general shop at the same premises. The keeping of the accounts both of the sub-post office and shop was managed entirely by the wife. Being in money difficulties with regard to the business of the shop, the wife, with the knowledge of her husband, started helping herself to money, the property of the Postmaster-General, from the till. Both the wife and husband stated in evidence that they thought they would be able to repay the money out of the wife's Post Office salary and from sales in the shop. False accounts had admittedly been put forward to conceal what was going on. The jury added a rider to their verdict that, in respect of counts 1 and 3, the appellants intended to repay the money and honestly believed that they could; and that with regard to counts 4, 5 and 6 they intended to repay, but had no honest belief that they would be able to do so.

J. H. Buzzard, for the appellants:

"Fraudulently" in the definition of larceny in section 1 of the Larceny Act, 1916, means "intending to act to the detriment of any other person against that person's wishes."

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An intent to injure in addition to an intent permanently to deprive is an essential ingredient of larceny at common law: Hawk. 1 P.C. 144, 145; East 2 P.C. 661. The *obiter dictum* of Parke B. in HOLLOWAY (1849) 3 Cox C.C. 241, at p. 244, which is quoted with approval in Russell on Crime, 10th ed., at p. 1075, that "'wrongful and fraudulent' probably means without a claim of right" conflicts with the examples given by Hawkins and East and should not be followed.

[BYRNE J.: Could not "fraudulently" mean "deliberately and not by mistake?"]

That may be one of the meanings, but such a definition, it is submitted, would not be comprehensive. In any event, mistake of fact comes under general principles of law not peculiar to larceny. Every word in the definition of larceny must be given its full meaning. "Fraudulently" must bear some meaning distinguishing it from the other ingredients of the offence contained in the definition. Moreover, the word must be given the same meaning throughout the Act, and the same meaning as "intent to defraud," as the two expressions are clearly interchangeable in sections 20 and 21. In *Re* GLOBE AND FINANCE CORPORATION [1903] 1 Ch. 728, at p. 732, Buckley J. defined "intent to defraud" as intending "by deceit to induce a man to act to his injury." That is an apt definition to cover cases of defrauding by means of false statements or documents, but is not wide enough to cover the meaning of the words "intent to defraud" or "fraudulently" in the Larceny Act. The definition submitted contains the essence of Buckley J.'s definition, but the modification of the language, and in particular the substitution of the word "detriment" for "injury," would make it clear to a jury that mere physical harm is not meant. Moreover, the definition suggested does not conflict in any way with the well-known passage in the summing-up of Channell J. in CARPENTER (1911) 22 Cox C.C. 618, at p. 621. If a person intends either to induce someone else to risk his money or himself to put someone else's money to risk, in cases in which he knows that the owner would

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not agree if he were aware of the true facts, such person is intending to act to the detriment of the owner against the owner's wishes. It must be conceded that an honest intention to repay, coupled with an honest belief in ability to repay in the future, is not necessarily a defence to larceny or to any other charge involving fraud.

That some such meaning as that suggested should be given to the word " fraudulently " may be illustrated by the following example. A barrister is unexpectedly compelled to spend the night in London away from home. Working late in Chambers, he remembers that he is short of cash, and takes some from the desk of a brother barrister, and at that moment a policeman appears. All the ingredients of larceny are present, apart from the meaning to be attached to the word " fraudulently." It is submitted that the barrister would not be guilty of larceny, because he would not have acted " fraudulently " within the meaning suggested.

On any view of the law, the issue of fraud was withdrawn from the jury by the Deputy-Chairman in this case, inasmuch as he directed them that " fraudulently " meant intending permanently to deprive the owner of the property.

R. C. Hutton, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE : The appellants, who are husband and wife, were indicted at the Monmouthshire Quarter Sessions before the learned Deputy-Chairman and other magistrates on an indictment containing eight counts. The first count charged larceny by both of them of the sum of £40. The second count, which I merely mention for the purpose of history, because they were acquitted on that, related to the larceny of £20. The third count, on which they were convicted, charged the larceny of £43, all of these sums being the property of the Postmaster-General. In the fourth count they were charged with stealing £100, the property of Her Majesty's Postmaster-General. The fifth count charged them with stealing £38, and in the sixth count they were charged with stealing £544 1s. 1d.

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the property of Her Majesty's Postmaster-General; and it was agreed at the trial that that was the aggregate of these and other sums they had taken, that is, that sum of £544 included the sums which were already the subject of the specific counts. The seventh and eighth counts charged the defendants as principals in the first or second degree with falsification of accounts. The jury convicted on all counts except the second, and they added a rider to their verdict or, as the Deputy-Chairman put it, a special verdict, that in respect of counts 1 and 3, the charges of stealing £40 and £43, the appellants intended to repay the money and honestly believed that they could; and in respect of counts 4, 5 and 6, the £100, the £38 and the total of £544, they intended to repay but had no honest belief that they would be able to do so. There is an appeal against those convictions.

The history of the case is a very short matter. The woman is a sub-postmistress and her husband carries on a general shop or stationery store. The post office is conducted at that place, and he said the management and the keeping of the accounts both of post office and shop were entirely looked after by his wife. What had been happening was this, and, do not let there be any doubt about it, this appears from the evidence of the appellants themselves. The business was in difficulties. They had not the money to pay the bills as they came in for the goods that were supplied to the business, and the woman started helping herself with the knowledge of her husband to the money in the till, which was the Postmaster-General's money, the money she was receiving as postmistress at this place in Monmouthshire. She helped herself to these various sums of money and used them in the business they were carrying on. Her evidence was, and the evidence of the husband supported her to that extent, that she thought she would be able to repay the money out of her Post Office salary and from sales in the business, but it was because this businesss was in difficulties and had not the necessary funds to carry on that she was taking this Post Office money. The male

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appellant said that he knew it was wrong to do it, but he thought it would all come right in the end.

This court cannot but regret the way in which this case was tried below. In the first place it would have been far better, more regular and simpler if these appellants, instead of being charged with larceny, had been charged with fraudulent conversion. The case would then have been comparatively simple. They had simply taken Post Office money for which they ought to have accounted either by paying over the aggregate amount, not necessarily the same coins, or by a cheque or by paying it into a bank, but they used the money for their own purposes. Unfortunately, the learned Deputy-Chairman permitted himself during the course of the case to enter into a long discussion, to use a somewhat neutral word, with counsel for the defence to clear his mind, as he put it, as to what the defence was. He drew in counsel for the prosecution, who was reluctant at that stage to take part, and for 15 or 16 pages of the shorthand note, during the time when one of the defendants was giving evidence, he discussed with them various points of law, definitions of fraud and what amounted to fraud, and one thing and another. The court is glad to observe that, after this had gone on for some time, another magistrate protested and said that it was not desirable that this sort of discussion should go on at that stage and that it was prejudicial to the defendants. It was most unfortunate that that state of affairs should have taken place at the trial. If it had not been that the defendants' own evidence made it perfectly clear that they were acting dishonestly, and that there was no real defence to the matter at all, except on one point with which I will deal in a moment, this court might have taken the view that this action by the Deputy-Chairman was such that it would have to quash the conviction, but we cannot say in this case that there has been any miscarriage of justice, and certainly on the falsification counts there is nothing to be said. False accounts were put forward and admittedly put forward to disguise and conceal what had been going on.

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The next thing I have to say is this: Count 6 of the indictment ought never to have been in the indictment at all, and we quash the conviction on the sixth count, but, of course, that makes no difference, because the other counts, for reasons with which I will deal in a moment, will stand. The sixth count concerns the aggregate of the sums of money of which the appellants were short, but they had already been charged in the earlier counts with the specific sums which they had taken, and this £544 is the aggregate, not merely of the amounts mentioned in the earlier counts, but of those counts and certain other moneys as well. That count, therefore, as it turned out at the trial, is bad for duplicity, and counsel for the prosecution ought to have abandoned it and the Deputy-Chairman ought not to have left it to the jury. It is very trite learning in criminal pleading that if you charge a man with stealing £1 in the first count of an indictment, you cannot then charge him with stealing £2 in another count of the indictment if those £2 are made up in part of the £1 which has already been charged in the first count. There is obvious duplicity and, as I have already said, this case would have been far simpler if the prosecution had put forward, as they ought to have done, that this was a case of fraudulent conversion, because difficulties may easily arise in the case of theft of coins, with which this case is concerned. As I say, the charge against the appellants is stealing the coins and notes that were in the till, taking out the money from the post office till and either putting it in the till belonging to the shop or into their pockets. We have to consider whether or not that amounts to larceny, considering that the appellants might quite properly have accounted to the Postmaster-General by paying over different coins of a like amount or notes representing the full amount of the takings. We have also to consider the question whether or not the fact that the jury have found that in respect of two counts the appellants intended to repay and had reasonable ground for believing that they could repay affords a defence, and in regard to the other counts whether the fact

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that they intended to repay but had no reasonable ground for their belief amounts to a defence. That would, of course, leave the conviction still untouched as regards the offences relating to falsification of accounts, as to which, as far as the court can see, there was no possible defence at all.

The definition of larceny in section 1 of the Larceny Act, 1916, is: "A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof." Doubts have arisen, which appear in some judgments and the textbooks, as to what is the meaning of the word "fraudulently" in the section and, as is well-known, the Larceny Act of 1916, which was a codifying Act, was never intended to alter the law. What was the meaning of the word "fraudulently," and does it add anything to the words "without claim of right"? It was apparently the opinion of Parke B. in HOLLOWAY (1849) 3 Cox C.C. 241, that the words "wrongful" and "fraudulent" meant without claim of right; but the first thing I think that should be remembered is this, that it is undoubtedly the law that an innocent taking and a subsequent appropriation with knowledge that the property is not yours does not amount to larceny. The subsequent misappropriation or conversion will not turn an innocent taking into a felonious taking for the purposes of larceny. There must be, first, an intention permanently to deprive the owner of his property in the goods. That is the first thing. There must also be an absence of a claim of right. If a person honestly believes that he has a right to the property, and the taking is in vindication or in exercise of a bona fide claim of right, that person is not acting feloniously. But the statute says: "Fraudulently and without a claim of right," and Mr. Buzzard quite rightly says that it is the duty of the court to give a meaning to every word in the section. Mr. Buzzard, who gave the court considerable assistance in his argument in this matter, submitted that the word "fraudulently" means

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intending to act to the detriment of any person against that person's wishes. The court thinks that the word "fraudulently" does add and is intended to add something to the words "without a claim of right," and we think it means this (though I am not saying that the words I am about to use will fit every case, but they certainly will fit this particular case) that the taking must be intentional and deliberate, that is to say, without mistake. You must know when you take the property that it is the property of another person and that you are taking it deliberately, not by mistake and with an intention to deprive the person of the property in it. A very simple illustration which sometimes arises is where a person picks up a suitcase at a railway station believing that it is his. There may be a suitcase on the platform when the luggage van is emptied which may so resemble his own that he may pick it up, believing it is his. There, the taking is under a mistake and he is not taking it fraudulently; of course, if he knows it is not his own, as the persons who haunt railway stations for the purpose of stealing suitcases do, then it is larceny; but if a person, although he is not there setting up a claim of right against someone else, is taking away a suitcase in the mistaken belief that it is his own, he is not acting fraudulently. We think that the word "fraudulently" in the section must mean that it is done intentionally and under no mistake, with knowledge that it is the property of another person.

A great part of the discussion in the court below took place because the defence was submitting that if the appellants intended to repay and had reasonable grounds for believing they would be able to make repayment, that would be an answer. We have to point out, as has been pointed out more than once in the course of the argument, that we are here dealing with the case of coins, and there is no question here that, having taken the coins or the notes from the till and used them in their own business, the appellants intended permanently to deprive the Postmaster-General of those coins and notes. That is the first thing. Does it make any difference,

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then, that they intended to repay, which can only mean in this case that they hoped they would be able to repay? In considering whether this court is to give effect to the rider of the jury, we must bear in mind the case which, as we have said before, is the *locus classicus* in this matter, Channell J.'s charge to the jury in CARPENTER (1911) 22 Cox C.C. 618, referred to by this court in the case of KRITZ, 33 Cr.App.R. 169; [1950] 1 K.B. 82. In that case we quoted the direction of the learned judge, which was given in a charge of false pretences, but on this point about honest intention it is just as apposite as in the case of larceny. Channell J. said this (at p. 624): "If the defendant made statements of fact which he knew to be untrue, and made them for the purpose of inducing persons to deposit with him money which he knew they would not deposit but for their belief in the truth of his statements, and if he was intending to use the money so obtained for purposes different from those for which he knew the depositors understood from his statements that he intended to use it, then, gentlemen, we have the intent to defraud, although he may have intended to repay the money if he could, and although he may have honestly believed, and may even have had good reason to believe, that he would be able to repay it. You see it is the fraud in the mode of getting the money because you may by fraud get hold of the money, even if you mean to repay it, and thoroughly believe that you can repay it—you are still defrauding the depositor. You are not defrauding him of the money if you eventually do repay it, but you are defrauding the man because you are giving him something altogether different from what he thinks he is getting, and you are getting his money by your false statement. In such a case as that the false statement would not be honestly made, and the question as to the intent to defraud substantially comes to this: Whether or not the statements were honestly made." For "statements," in this case we have to substitute "actions," because the money was taken; it was not obtained by statements. Here the money was taken and the appellants

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intended to use the money for purposes different from those for which they were holding the money and for which the persons who paid the money intended it to be used, namely, for paying the Postmaster-General for stamps or postal-orders, and for purposes different from those which their employer the Postmaster-General, to their knowledge, intended they should use it. Therefore, it seems to the court in this case that, by taking the actual coins and notes and using them for their own purposes, the appellants intended to deprive the Postmaster-General of the property in those notes and coins, and in so doing they acted without a claim of right and they acted fraudulently because they knew what they were doing. They knew they had no right to take the money which they knew was not their money. The fact that they may have had a hope or expectation in the future of repaying that money is a matter which, at most, can go to mitigation and does not amount to a defence. Therefore, it appears to us that the appellants' own evidence shows that they were guilty of the larcenies with which they were charged.

We have already commented on what we think was the unsatisfactory nature of this trial by reason of the long discussions which took place between the Deputy-Chairman and counsel. There was not the least necessity to have invited submissions by counsel at the time when he did; he could have asked for submissions at the proper time, and he could then have given his ruling. It is unfortunate, too, we think, that he asked for special verdicts in this case, but still there it is, and it makes no difference.

It remains, therefore, to consider only the question of sentence. The sentence on the woman was 18 months' imprisonment and on the man two and a half years. Why it seems so often to be considered, where a man and woman are involved, that the woman should always receive a less sentence than the man, I do not know. Of course, there are cases in which it is right that she should. If you have a young woman stealing under the influence of a man, it is quite right that

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she should receive a less sentence than the man. In this case one would have supposed that it was the woman who was by far the more to blame; she was the postmistress, she was helping herself to the money and she was using it for the business in which she was interested along with her husband. The husband seems to have been a weak sort of person who did not protest, and yet he gets a year more than the woman gets. But as the sentences of 18 months and two and a half years respectively were passed on the count we have quashed, the sentences on both the appellants on the other counts, namely, one month, 12 months and 12 months, all concurrent, will stand, so each appellant will serve the same sentence.

Convictions on one count quashed.
Sentences reduced.

Solicitors: Lyndon Moore & Co., Newport, Mon., agents for The Solicitor, Post Office, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LYNSKEY AND MR. JUSTICE PARKER

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Sentence—Breach of Probation Order or Order of Conditional Discharge—Duty to Pass Separate Sentence—Concurrent Sentence Generally Inappropriate—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 8, 12 (1).

Where a court is asked to take into consideration a breach of a probation order or of an order of conditional discharge, a separate sentence should be passed in respect of the original

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offence, so that the conviction of the original offence may rank as a conviction under section 12 (1) of the Criminal Justice Act, 1948. Such a sentence should be ordered to run concurrently with the sentence passed in respect of the subsequent offence, only where the latter is of substantial length.

Appeal against sentence.

The appellant pleaded Guilty at Essex Quarter Sessions on January 30, 1953, to three charges of housebreaking and larceny. At his request 28 other offences and also a breach of a probation order made by the same court on October 24, 1951, were taken into consideration. He was sentenced to concurrent terms of five years' imprisonment on each of the three charges. No sentence was passed in respect of the breach of the probation order.

No counsel appeared.
The appellant appeared in person.

THE LORD CHIEF JUSTICE: The appellant pleaded Guilty at Essex Quarter Sessions to three offences of housebreaking and larceny, 28 other offences were taken into consideration, and in addition—and this is what makes this case one of some importance of which we hope notice will be taken—a breach of probation was taken into consideration. The learned Deputy Chairman had his attention brought to the breach of probation and said that he was taking it into consideration. He passed three sentences of five years' imprisonment, all being concurrent, but none of those sentences was a concurrent sentence in respect of the breach of probation.

The court desires to call the attention of all the courts exercising criminal jurisdiction to a matter which arises under section 12 of the Criminal Justice Act, 1948. By subsection (1) of that section it is provided that a conviction for which the offender is either placed on probation or granted a conditional discharge shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which

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the order is made and of any subsequent proceedings which may be taken against him under the foregoing proceedings of the Act. The section contains a proviso that whenever an offender who was not less than 17 at the time of the conviction for which he was placed on probation or conditionally discharged is subsequently sentenced for that offence under that part of the Act, that is to say, under section 8, the provisions of the subsection shall cease to apply to the conviction. One of the effects of these provisions is that a conviction resulting in an order of probation or conditional discharge cannot rank as a conviction for the purpose of imposing thereafter a sentence of corrective training unless by reason of a subsequent offence a sentence is imposed for the earlier one.

It appears that not infrequently when a person subject to one of these orders is found guilty of a subsequent offence the court sentences him for the latter offence and at the same time says that it is taking into account the breach of the probation order or of the order of conditional discharge. That was done in the present case, the appellant being on probation at the time when he committed the three offences. It must, however, be borne in mind that the practice of taking other offences into account, however beneficial and advantageous to an offender, is based merely on convention and has no statutory foundation. It arose entirely from a desire to give a prisoner a clean sheet when he comes out of prison and to obviate the necessity or chance of his being rearrested and charged and again returned to prison. A sentence which the court states is taking other offences into consideration is still in law only passed for the offence with which the court is actually dealing. Thus, if a conviction carries only a sentence of, say, 12 months' imprisonment, the court cannot pass a larger sentence by taking other offences into consideration: see TREMAYNE (1932) 23 Cr.App.R. 191 and HOBSON (1942) 29 Cr.App.R. 30. It has also been held that, when the conviction

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has been quashed on appeal, the prisoner may be subsequently indicted and tried for offences which the court took into consideration, as there has been no conviction for those offences and therefore no plea of *autrefois convict* could be raised: NICHOLSON (No. 2) (1947) 32 Cr.App.R. 127; NEAL, 33 Cr.App.R. 189 at p. 199; [1949] 2 K.B. 590 at p. 600.

It is, therefore, undesirable and, indeed, wrong merely to take breaches of probation or of conditional discharge into consideration. They should be separately dealt with and separate sentences passed, so that the original offences may rank as convictions, as they will by virtue of the proviso already quoted. There may be cases in which a court would think fit to make the sentences for the original and subsequent offences concurrent, but it would seem desirable that this power should only be used sparingly, and where the sentence for the subsequent offence is of substantial length; it is most important that offenders should be made to realise that discharge whether on probation or conditionally is not a mere formality, and that a subsequent offence committed during the operative period of the order will involve punishment for the crime for which the offender was originally given the benefit of this lenient treatment. As the appellant has received a substantial sentence of five years' imprisonment, the court will impose a sentence for the breach of probation, so that the original conviction may in future rank as a conviction. The sentence on the first count will be one of three years' imprisonment and on each of the other two the sentences will be five years; for the breach of probation the sentence will be two years. All the sentences will run concurrently, but the sentence of five years' imprisonment in all will stand. The appeal is dismissed.

Appeal dismissed.

CIRCUIT CASE

[WELSH CIRCUIT—GLAMORGAN ASSIZES]

BEFORE

MR. JUSTICE DEVLIN

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R. *v.* ROBERTS *

Procedure—Fitness of Prisoner to Plead—Request by Defending Counsel that General Issue be First Tried.

On arraignment for murder the prisoner stood mute, and a jury, on being impanelled, found that he was mute by the visitation of God. Counsel for the Crown submitted that the issue of the fitness of the prisoner to plead to the indictment should next be tried, but counsel for the defence indicated that he had a defence on the merits and desired that the general issue of Guilty or Not Guilty be first tried.

Held, that in the circumstances it was proper not to impanel a jury to try the issue of fitness to plead first, and that the jury should be sworn at once to try the general issue.

BERRY (1876) 1 Q.B.D. 447, and STAFFORD PRISON GOVERNOR, *ex p.* EMERY [1909] 2 K.B. 81, referred to.

Trial at assizes before Devlin J.

On arraignment for murder the prisoner, George Roberts, stood mute; a jury was impanelled, and, evidence (which was not contradicted) having been called by the defence to show that he was deaf and dumb from birth, he was found mute by the visitation of God. Counsel for the Crown submitted that the evidence so far called raised a presumption of idiotism; that prima facie the prisoner was unfit to plead, and incapable of following the proceedings, instructing the defence, or challenging a juror; and that on the authorities this issue

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* The Editor is indebted to Hywel ap Robert, Esq., Barrister-at-Law, for the preparation of this report.

(upon which the Crown had further evidence to call) should be next tried. It was common ground that if the prisoner were found unfit to plead the learned judge must order his detention as a Broadmoor patient till Her Majesty's pleasure should be known.

Counsel for the defence submitted that there was no precedent for trying the matters referred to before the general issue on the application of the Crown, though the defence might so apply; and that no presumption of idiotism arose. In reply to Devlin J. he intimated that there was a defence on the facts, and he desired on behalf of his client that the jury should try him on the general issue.

H. V. Lloyd-Jones, Q.C., and *J. Jones Roberts* for the Crown.

H. Edmund Davies, Q.C., *S. J. Havard Evans* and *Hywel ap Robert* for the prisoner.

The following authorities were referred to: JONES (1773) 1 Leach 102; STEEL (1787) 1 Leach 451; PRITCHARD (1836) 7 C. & P. 303; DYSON (1831) 7 C. & P. 305n.; Hale, *Pleas of the Crown*, Vol. 1, p. 34; BERRY (1876) 1 Q.B.D. 447; STAFFORD PRISON GOVERNOR, *ex p.* EMERY [1909] 2 K.B. 81; HARROD *v.* HARROD (1854) 1 K. & J. 9; TURTON (1854) 6 Cox C.C. 385; CHRISTIE, 10 Cr.App.R. 141; [1914] A.C. 545.

DEVLIN J.: In this case the accused man has been found to be mute by the visitation of God upon the verdict of a jury, and principle and authority direct that, unless there is some reason for taking some other course, that finding should be the basis of entering a plea of Not Guilty on behalf of the accused. But when the accused is found mute of malice or mute by the visitation of God, a question very often arises at the beginning of a trial whether he is fit to plead, and it has been laid down quite clearly by the authorities that, if it be established that a man's mind is such that he would be

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incapable of understanding the nature of the proceedings, it would not be right that he should be put upon his trial and convicted for the offence: such a conviction could not stand. It is clear from the authorities that it is not merely defects of the mind which may bring about that result. Defects of the senses, whether or not combined with some defect of the mind, may bring about that result, and the authorities are clear that, if there is no certain means of communication with the accused man, so that there is no certain means of making sure that he will follow as much as it is necessary he should follow of the proceedings at his trial, then he should be found unfit to plead.

In this case, the prisoner being, as I have said, mute by the visitation of God, counsel on both sides are agreed that there is no certain means of communicating to the prisoner what takes place at this trial, and the question which has arisen is whether the issue of fitness to plead has to be determined by the jury in this case, as it is in most cases, at once, the jury being specially sworn for that purpose, or whether it can be tried and determined by the jury together with the trial and determination of the general issue whether the prisoner be Guilty or Not Guilty. Counsel for the defence wishes that general issue to be tried. He has not disclosed, as, of course, he is not bound to disclose, what the nature of his defence is. It may well be that the defence is that the prosecution witnesses do not make out a prima facie case; or it may be that the defence have at their disposal other witnesses, not yet called, who, if believed, would destroy the case which the prosecution would otherwise have made out. Whatever the nature of the defence may be, it is a perfectly conceivable situation, though it never appears to have arisen in practice before, that counsel for the defence, although he cannot be instructed by the accused man, may say "I do not think the prosecution can bring any case against this accused man at all. If they can, then of course I am in no position to defend it with his aid because he cannot instruct me and

cannot tell his story. But as the prosecution can make out no case, I am not prepared to let the matter go merely upon the issue of whether he is fit or unfit to plead." Of course, if that issue is tried alone, and a verdict is returned by the jury that he is unfit to plead, the court has no power except to order that he should be detained as a Broadmoor patient until Her Majesty's pleasure be made known.

In my judgment, counsel for the defence should not be forced to accept that course for his client if he thinks he can properly obtain for his client a verdict of Not Guilty. Nor should he be forced to elect. He must be entitled to retain his right to say that the accused is not in a position to give him instructions and therefore he cannot put him in the witness-box to tell his own story. He should not be forced to say to himself: " Shall I play for safety and obtain a verdict whereby this man is detained as a Broadmoor patient, or shall I, in effect, gamble upon the chance of my being able to get him off altogether, with the knowledge that if my gamble fails he will be convicted of murder, and there is only one sentence which the court can pass? "

The position does not seem ever to have arisen before, and counsel have told me they have found no authority on the matter. It seems to me there must be some procedure which would enable counsel for the defence to have the advantage of taking both points. There cannot be any doctrine in a criminal case which compels counsel to elect. If there was no such procedure, I think it would be necessary to invent one. To insist upon the issue of fitness to plead or not being tried might result in the grave injustice of detaining as a Broadmoor patient a man who was quite innocent; and it might result in the public mischief that a person so detained would be assumed, in the eyes of the police and of the authorities, to have been the person responsible for the crime, whether he was or was not, and investigations which might have led to the apprehension of the true criminal would not take place.

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I think the authorities indicate that there is a procedure which can properly be followed in a case of this type. The earlier authorities all deal with the principles upon which a jury should be charged on the issue of fitness. I have not investigated them, but Mr. Davies told me, without contradiction, that in each of the earlier authorities the point of fitness had been taken by the defence, and, of course, it may very well be, and most frequently will be, that the defence is in the position of having no answer to a prima facie case, and no ground to urge why the law should not take its course, except the ground that the prisoner is incapable of understanding the proceedings at the trial. But in the case of BERRY, 1 Q.B.D. 447, which came before the Court of Crown Cases Reserved in 1876, a different course was followed. Whether it was followed designedly or not, so that there should be some inquiry into the general issue, I do not know. But, at any rate, although the question arose whether the accused was fit to plead or not, it was not submitted to the jury until the prosecution had proved their case, and when it was submitted to them they were asked for a special verdict in conjunction with their verdict on the general issue. That case was also one, as it happened, where the jury had been sworn to ascertain whether the prisoner stood mute of malice or by the visitation of God, and they found that the prisoner was mute by the visitation of God. Then the trial proceeded because there was a gentleman who, it was apparently thought, might be able to communicate with the prisoner by means of sufficient signs. The learned Chairman of quarter sessions then put two questions to the jury: first, whether they found the prisoner Guilty or Not Guilty upon the indictment, and, secondly, whether in their opinion, the prisoner was capable of understanding, and had understood, the nature of the proceedings. The verdict of the jury was: "We find the prisoner Guilty on the evidence; and we also find that he is not capable of understanding, and, as a fact, has not understood, the nature of the proceedings." A Case was

stated, and the court held that the proper course was that he should be detained under the Act as the finding of the jury amounted in point of law to a finding of insanity.

I think that that is the first reported case in which the two issues, the general issue and the issue of fitness to plead, were put before a jury together. While the correctness of the procedure was not directly considered by the court, it is significant that there is nothing to be found in the judgments in BERRY (*supra*) which expresses or implies the slightest criticism of that procedure. In the course of the argument Kelly C.B. said (at p. 449): "But here the jury have found also that the prisoner was incapable of understanding what passed at the trial, and can it be contended that he might, under such circumstances, be convicted? The question which ought to have been put to the jury in STEEL'S CASE ((1787) 1 Leach 581) was properly put in the present one." Although the learned Chief Baron was not dealing in terms with the time when it was put, it would be a curious observation to make if his view was that, although the question was properly put, the procedure by which it had been put was entirely wrong and the issue ought to have been tried earlier and separately. The court treated the verdict of the jury so returned as a valid verdict because, on the question being raised whether there was any authority for detaining the accused as an insane person, Kelly C.B. relied upon the finding of the jury as justifying that course.

That case and all the earlier cases of any importance were considered by a Divisional Court in STAFFORD PRISON GOVERNOR, *ex p.* EMERY [1909] 2 K.B. 81. That was a case where an accused person who had been found by a jury to be unfit to plead was detained under the Criminal Lunatics Act, 1800, and the validity of his detention was challenged by a writ of habeas corpus, the question which the court had to determine being whether deafness and inability to read and write and, so, to be communicated with, was equivalent, for the purposes of the wording of the Act, to a finding of insanity, and

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they held that it was. But in the course of that case the learned judges reviewed all the earlier authorities and, in particular, the cases of STEEL (*supra*) and PRITCHARD (1836) 7 C. & P. 303, and DYSON (1831) 7 C. & P. 505n., in all of which cases the issue had been put to the jury without the general issue being gone into, and then referred to the case of BERRY (*supra*). In that case the learned Lord Chief Justice, Lord Alverstone, recited the facts of the case, again without any criticism of the procedure which had been followed, and at the end of his judgment he followed all the decisions in these terms (at p. 87): "That [BERRY (*supra*)] is a decision which approved of and adopted the view of the law taken by Parke J. and Alderson B. years before; and, following and adopting those decisions, I think that Channell J. in the present case laid down the right test of insanity for the purpose of the Act of 1800 and rightly made an order for the prisoner's detention during His Majesty's pleasure." That shows that the view which the Lord Chief Justice took was that all these authorities were laying down one doctrine; the difference between them, the time when the verdict is taken, being only, I think, a difference of procedure.

I can find no authority in these cases which prevents counsel for the defence who wishes to test the prosecution's case on the general issue from having the right to do so, and at the same time to preserve all those rights which flow to the defence from the fact, if it be so established, that the accused is a person who is incapable of being communicated with or instructing counsel for his own defence. Were it otherwise, I think the gravest mischief and injustice might follow. As I have said earlier during the argument, the defence might wish to tender a witness who, if he was believed, could prove that the accused was 10 miles away at the time of the alleged crime. It cannot, I think, be our law that, by some formality of procedure, the defence is prevented from laying matters of that sort before the jury, and so obtaining, if they can, for an incapacitated client a verdict of Not Guilty.

I have not concerned myself, in the course of giving this ruling, with the question whether it is right for the prosecution to raise the issue, or whether the burden is on the prosecution or the defence to establish unfitness to plead. The issue here is the fundamental one, not whether the prosecution or the defence should take the point first—but whether the defence can be put in the position of having to choose between fighting the general issue and dealing with the issue of unfitness to plead. Upon that fundamental question I think that the submission made to me by Mr. Davies is the right one. Therefore, the jury will not be sworn to try separately the question whether the accused person is fit or unfit to plead. They will be sworn merely to try the general issue.

I do not know whether, in those circumstances, any difference of opinion exists between you as to what issues should be left to the jury, and what form of verdict they should be asked to return. If there is, it might be convenient, since we are discussing the whole matter, that we should consider that point as well.

Both counsel intimated that there was no objection to the form of questions to the jury, or to the form of verdict, in BERRY'S CASE (*supra*).

DEVLIN J.: "Subject only to this, that if, as I gather may well be the case, evidence is called and is not contradicted to show that the accused is incapable of understanding the proceedings, then I should direct the jury, should I not, that they cannot return a verdict of Guilty? I think then that the form of the questions in BERRY (*supra*) may give rise to some difficulty."

After further argument:

DEVLIN J. said: "I do not see why I should not leave the questions to the jury in the form in which they were left in BERRY (*supra*), but if the jury return a verdict of 'Guilty' I

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shall take the course which the Court of Crown Cases Reserved took and make the order which that court said was the proper order to be made."

The indictment was read, and a plea of Not Guilty entered by direction of the learned judge. Leading counsel for the accused was invited to challenge the jurors if he thought fit; he did not do so. He did not desire any part of the proceedings to be interpreted to the accused, and Devlin J. so directed, observing that if there was no certain means of communicating with the accused, there was no possible advantage in embarking on a doubtful means.

The trial then proceeded. The Crown conceded that, unless certain purported statements by the prisoner came before the jury, they could not be asked to convict. Evidence of such statements was therefore at Devlin J.'s suggestion called first. It was debated whether the issue that the accused could not have made and did not make the purported statements was triable by the judge or was a matter for the jury. Objections going to the voluntary character of the purported statements (such objections being, it was conceded, always triable by the judge), were also raised.

DEVLIN J. ruled: "I shall inquire into the two questions whether the statements which are alleged to have been made by the accused were in fact his statements and, if so, whether they were made voluntarily and in accordance with the Judges' Rules. I shall reach a conclusion of fact upon the latter question in the ordinary way. Upon the former question, it seems to me, subject to anything which Mr. Davies may say, that this would be right, that if I think there is some evidence fit to go to the jury that they are his statements, I shall admit the statements and let them go to the jury. If I do not think there is any evidence fit to go to the jury that they are his statements, I shall rule them out."

The court adjourned.

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March 24. The Crown, with Devlin J.'s approval, offered no further evidence on the indictment. Evidence was heard on the circumstances of the accused's detention, and the learned judge made observations (not here material) on the law of arrest. The jury, by direction, found the accused Not Guilty.

Verdict—Not Guilty.

Solicitors: Myer Cohen & Co., Cardiff, for the prisoner.

BEFORE

MR. JUSTICE HALLETT, MR. JUSTICE STREATFEILD AND MR. JUSTICE DONOVAN

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Practice—Grounds of Appeal Involving Questions of Law and Questions of Fact—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3 (a), (*b*).

Evidence—Similar Facts—Issue of Identity.

Where an appellant has a ground of appeal involving a question of law entitling him to appeal without leave, he cannot by including in his notice of appeal grounds involving questions of fact or mixed law and fact obtain the right to appeal on these also without leave.

In such a case the practice of the court has been to list the case not as an appeal, but as an application for leave to appeal; but the court can, in a proper case, direct that, so far as the question of law is concerned, the matter shall be listed as an appeal to be heard without leave.

The appellant was charged with robbery with violence on September 3, 1952, and with robbery with aggravation on September 19, 1952. The appellant was identified as the driver of a car which had been seen rehearsing the attack which was the subject of the first charge. He was identified by another witness as one of the assailants in the second charge.

Held, that the jury, if it were proved to their satisfaction that the appellant was the driver of the car concerned in the

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first charge, were entitled to have regard to that fact as assisting them on the issue of identity in the second charge, and that it was proper so to direct them.

HARRIS, 36 Cr.App.R. 39; [1952] A.C. 594, distinguished.
STRAFFEN, 36 Cr.App.R. 132; [1952] 2 Q.B. 511, followed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on December 15, 1952, of robbery with violence and robbery with aggravation, and was sentenced by the Lord Chief Justice to concurrent terms of 10 years' imprisonment and was made subject to the provisions of section 22 of the Criminal Justice Act, 1948.

The notice of appeal was supplemented by particulars of the grounds of appeal under three heads: (i) that the Lord Chief Justice misdirected the jury in law by telling them that evidence against the appellant on the first count of robbery was also evidence of his guilt on the second count of robbery; (ii) that the Lord Chief Justice misdirected the jury on fact in nine particulars specified; (iii) that, generally, the Lord Chief Justice omitted to put the defence adequately to the jury.

The first matter in respect of which the appellant was convicted was an occurrence on Wednesday, September 3, 1952, when a cashier belonging to Messrs. Lyons was taking money from Lyons' factory at Greenford to the bank. The car in which he was taking the money was forced to stop by another car and he and the driver were assaulted by masked men from the overtaking car. In that case the appellant was not identified by either of the two men who were attacked, but a witness named Gilbert gave evidence of having seen a Jaguar car, which it was not disputed was the Jaguar car ultimately used in the attack on Messrs. Lyons' cashier, and three or four men rehearsing the crime which was ultimately carried out. Gilbert had seen this car on five occasions prior to the crime, the last occasion being at or about the time when the crime was committed. Gilbert gave evidence that the driver of that Jaguar car was the appellant. The case for the appellant was that Gilbert's identification was unreliable

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and mistaken, and that at the time when the appellant was alleged to have been at this place committing this crime he in fact was elsewhere, and he called certain evidence, apart from his own, in support of that defence of an *alibi*.

The second offence in respect of which the appellant was charged took place on Friday, September 19, 1952. In that case, some employees of a firm called Evan Williams were fetching money back from the bank. Once more a car was used to impede the van in which they were travelling, and once more masked men attacked and robbed the employees. The cashier in that second case was a man named Wood, and he identified the appellant as being one of the assailants.

Edward Clarke for the appellant:

The appellant is appealing on a point of law which, by virtue of section 3 (*a*) of the Criminal Appeal Act, 1907, he is entitled to do without leave. He has included in his grounds of appeal grounds of fact and mixed law and fact, and it is submitted that the fair construction of the section is that he should be allowed to raise these grounds of appeal also at the same time. The practice of the court on this matter has not been uniform, but it is submitted that the course which it is desired to follow in the present case is obviously the convenient one.

The Lord Chief Justice was wrong in directing the jury that, in considering the second charge, they were entitled to have regard to the evidence relating to the first charge. [He referred to various passages in the summing-up which are set out in the judgment, and to HARRIS, 36 Cr.App.R. 39; [1952] A.C. 594, and STRAFFEN, 36 Cr.App.R. 132; [1952] 2 Q.B. 511.]

Victor Durand for the Crown.

HALLETT J.: The appellant was convicted at the Central Criminal Court before the Lord Chief Justice upon two charges, the first being a charge of robbery with violence and the second being a charge of robbery with aggravation. He was sentenced

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to 10 years' imprisonment and was made subject to section 22 of the Criminal Justice Act, 1948.

There was lodged on his behalf a notice of appeal which was in very general terms and was supplemented by particulars of the grounds of appeal, which had obviously been settled by counsel. Those particulars are given under three heads. In the first place, it was complained: "That the Lord Chief Justice misdirected the jury in law by telling them that evidence against the appellant on the first count of robbery was also evidence of his guilt on the second count of robbery." The second head was: "That the Lord Chief Justice misdirected the jury on fact," in nine particulars which were there specified; and the third head was that: "Generally the Lord Chief Justice omitted to put the defence adequately to the jury, and in the circumstances of a difficult case the summing-up was improperly unfavourable to the appellant, thereby resulting in a miscarriage of justice."

There arises in connection with this matter a question of procedure with which it is desirable the court should deal, and which it may be convenient I should deal with first. First of all, there would be neither this court nor the right of appeal to it but for the provisions of the Criminal Appeal Act, 1907. Accordingly, if a question arises on the right of appeal, it is to the statute that one must look to discover what right was conferred, and subject to what conditions, if any, and to what limitations, if any, and it is necessary for this purpose to look only at section 3. That section provides: "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—(*a*) against his conviction on any ground of appeal which involves a question of law alone; and (*b*) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal." We are not concerned with (*c*) for the present purposes.

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The words of subsection (*a*), in our opinion, must be carefully observed. He is not given a right of appeal, as Mr. Clarke appears to be contending, to the Court of Criminal Appeal if he has a ground of appeal which involves a question of law alone. He may appeal to the Court of Criminal Appeal without leave on a ground of appeal which involves a question of law alone. It appears that the correct application of subsection (*a*) depends on one of three views. The first view would be that the subsection gives a right of appeal if the only ground of appeal is one involving a question of law alone; in other words, that the appellant only gets a right of appeal at all without leave if he elects to confine himself to a point of law alone. The second view would be that by subsection (*a*) an appellant is granted a right of appeal without leave in so far as his ground of appeal is a ground of appeal which involves a question of law alone. The third view, which is the view for which Mr. Clarke, as we understand it, contends, is that if he has a ground of appeal which involves a question of law alone, then he can appeal without leave both on that question and on questions of fact or mixed law and fact. The first view, the strict view, has been applied to cases in which the notice of appeal includes questions of law as well as questions of fact, and such cases have been listed to be heard as applications. The information which the court has is that in the past, where there have been notices with a mixture of grounds of law and fact, the practice has been to put the cases in the list as applications for leave to appeal. I gather that Mr. Clarke's recollection of the practice is different. I want to make it quite plain that, where any difficulty arises upon this question how a particular matter should be listed, it is the practice of the registrar or those acting for him to take the directions of the Lord Chief Justice or some other member of the court. It must not be thought from what I am saying that anything has been done by the registrar without seeking directions; but it has been the practice, according to the information we have, that, as a

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rule, where the notice has contained a mixture of grounds of law and grounds of fact, the case should be listed as an application for leave to appeal. If the first or strict view were taken that an appellant has a right to appeal without leave only if he confines himself to a point of law, that would be the right procedure. On the present occasion, however, the matter having been considered, it was thought that as the appellant had a ground of appeal which involved a question of law alone—and no one has suggested that it was a frivolous point—it would not be right to say to the appellant: "You cannot raise this point without leave, because you have chosen in your notice of appeal to associate it with other points which clearly fall within the scope of (*b*)." For that reason, directions were given that, so far as the point of law was concerned, the matter should be listed as an appeal to be heard without leave. On the other hand, if the third view were taken, the view that for an appellant to have a point of law and include it in his notice is sufficient to enable him to argue points of fact without leave, then it seems to us that there would be a clear way of making subsection (*b*) in very many cases indeed entirely inoperative. In this case, as I have already said, there is a substantial point of law, but, in many cases the point of law is, to use a word used by Mr. Clarke, of a tenuous nature, although not so obviously frivolous and vexatious that it ought to be disposed of out of hand; and if by including such a point of law the court can be compelled to entertain an appeal on grounds of fact without leave, it seems to us that what the statute obviously intended by subsection (*b*) would be frustrated in very many cases.

For these reasons, we think that where the appellant is entitled under section 3 (*a*) to appeal to this court on a ground of appeal which involves a question of law alone, that does not entitle him also to appeal to this court on a ground of appeal which involves a question of fact alone or a question of mixed law and fact. We recognise, indeed we could not but recognise, that the course which has been followed on the

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present occasion has grave practical inconveniences. In some ways it would be much more convenient if we could deal with both matters at one and the same time. On the other hand, it would be, as it seems to us, against the spirit of what Parliament has provided by subsection (*b*), if we were to allow questions of mixed fact and law to be put forward without leave merely because one of the grounds inserted in the notice of appeal was a ground which raised questions of law alone. So much for the question of procedure.

Now I will proceed to deal with the matter which is raised by this appeal. [His Lordship then stated the facts as set out above, and continued:] Between the two crimes there were certain elements of similarity which have been examined and analysed with great care by the appellant's counsel, Mr. Clarke, who submits that the similarities were not as significant as certain observations of the Lord Chief Justice might have led the jury to suppose.

In our view there are two aspects from which this matter must be considered. First of all, there is the question whether the evidence in connection with the first charge could or could not be used by the jury, if they thought proper, as assisting them in deciding whether the identification of the appellant in connection with the second charge was mistaken. The sole issue here, as Mr. Clarke agrees, and as quite clearly appears from the whole case, is the question of identification. Was the appellant identified as participating in the first offence; was he identified as participating in the second offence? The first question which therefore arises is: Was the evidence of what happened in connection with the first offence if the jury accepted the evidence of Mr. Gilbert, and if, accordingly, they were satisfied that the appellant was implicated in the first offence, something which the jury could take into account as tending to help them, in so far as they thought it did, in arriving at their decision on the second charge? That is a question of admissibility. Then there is the question also of the weight of the evidence, and we think that a good many

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of the observations which have been addressed to us by Mr. Clarke were really dealing with the weight of the evidence. The weight of the evidence is undoubtedly a matter for consideration both by the judge and by the jury. It is a matter for consideration by the judge on grounds which have been so amply dealt with by the House of Lords in the speech of Lord Simon in HARRIS. He says this (36 Cr.App.R. 39, at p. 54; [1952] A.C. 594, at p. 707): "There is a second proposition which ought to be added under this head. It is not a rule of law governing the admissibility of evidence, but a rule of judicial practice followed by a judge who is trying a charge of crime when he thinks that the application of the practice is called for." Then he goes on to discuss that rule of judicial practice, and there is another reference to the same topic in the recent case of STRAFFEN (36 Cr.App.R. 132; [1952] 2 Q.B. 911) where Slade J., in delivering the judgment of the court, refers at the very end of his judgment (36 Cr.App.R. at p. 143; [1952] 2 Q.B. at p. 917) to the question of evidence, although admissible, having a prejudicial effect "so disproportionate to its probative value that the learned judge, in the exercise of his discretion, ought not to have allowed its admission." In that case Mr. Elam, who appeared for the appellant, conceded that, if the evidence was admissible, the discretion of the learned judge at the trial, having been judicially exercised, could not be reviewed in this court. I mention that because some of the observations of Mr. Clarke appeared to us to be directed to the exercise of the judicial discretion of the Lord Chief Justice in reference to this aspect of the matter in observations he made to the jury.

The weight of the evidence then may, as a matter of judicial practice, be considered by the judge and he may decide in the exercise of his discretion that it had better not be given or, if it is given, that he had better warn the jury to pay no attention to it. The weight of the evidence is always a question for the jury, and in this case it seems to us that the Lord Chief Justice was extremely careful in the very passages

of which the appellant through his counsel complains to make it obvious to the jury that it was on their view of the value of this evidence that their decision must ultimately depend, although he put the evidence before them and, it may be, to some extent, indicated a view of his own; but on this appeal the only matter which concerns us is not the weight of the evidence, but whether the evidence was in point of law admissible at all. The principles governing this aspect have now been laid down in more cases than one and by the tribunal of the highest authority, and it seems to us that at this time of day there is not really any doubt with regard to the principle itself. There may be a doubt in any given case with regard to the proper application to the particular circumstances of the charge that is being tried of the principles which are now well established: see Lord Simon's speech in HARRIS (36 Cr. App.R. at p. 52; [1952] A.C. at p. 705). Accordingly, since the principles are clear, and it is the application of them that requires attention, it is not very easy for this court either now or at any other time to be assisted in deciding the correct application of the principles by scrutinising the way in which the principles have been applied on very different facts.

Mr. Clarke has relied very much upon the decision of the House of Lords in HARRIS (*supra*), but it seems to us that there the facts were very special and of a very different character from the facts with which we have to deal here. In that case, a policeman who was on duty in a certain market at Bradford was charged with having carried out, to put it shortly, eight offences of office-breaking and larceny on a series of dates in May, June and July, 1951. The counts were all tried together, and on the first seven he was acquitted, but he was convicted on the eighth count, which related to the occurrences on a certain Sunday morning, July 22. Owing to what had been happening in the way of thefts, an alarm had been fixed to certain premises and, upon the alarm bell ringing, some police officers arrived on the scene, and just outside the premises where the last theft had taken place, two detective

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officers found the appellant, who was on solitary police duty in the market, as he had been on other occasions. There was no question whatever of the identity of the man whom they found there; it was admittedly the appellant. The sole issue as regards July 22 was whether his presence there was a presence for an innocent purpose in connection with his duty as a policeman in the market, or whether his presence there was connected improperly and in a sinister way with the theft which had just occurred. There was no question of identity at all.

As regards the seven earlier occasions, his counsel contended, as appears from the argument (36 Cr.App.R. at pp. 43 and 48; [1952] A.C. at pp. 698 and 703) that none of the evidence relating to the previous occasions proved that the appellant was the person who broke into the premises on those occasions as distinct from proving that the appellant had the opportunity of doing so. The most that the evidence of the earlier thefts proved was that some person had broken into the premises and that the appellant had the opportunity of doing so. That was the argument of counsel for the appellant, and it seems clear to us that that argument was accepted by their Lordships with the possible exception of the dissenting Lord, Lord Oaksey, as correct. Perhaps it is put plainest of all in the speech of Lord Morton where he said (36 Cr.App.R. at p. 63; [1952] A.C. at p. 715): "I desire only to add that, in my view, evidence as to the thefts which occurred on the first seven occasions was not admissible for the purpose of the trial of the appellant on the eighth count, because the appellant was not proved to have been near the shop, or even in the market, at the time when these thefts occurred." Then there is a passage from the speech of Lord Simon (36 Cr.App.R. at p. 59; [1952] A.C. at p. 711), where he said this: "The eighth count raised two issues: (i) Was the money stolen on July 22? (ii) Is it proved that it was the appellant who stole it? Previous events could not confirm (i), which, indeed, was proved beyond dispute. As for (ii), the

accused denied that he was the thief, and the fact that someone perpetrated the earlier thefts when the appellant may have been somewhere in the market does not provide material confirmation of his identity as the thief on the last occasion," the reason clearly being because there was no evidence of his identity as the thief on the previous occasions.

I propose to say no more about the facts in HARRIS (*supra*) but to turn to the facts so far as they are material here. The facts here are that Gilbert had given evidence which, if it was believed, might be regarded by the jury as establishing the identity of the prisoner as one of the men concerned in the first crime, and the Lord Chief Justice in one of the passages complained of is, as we think, most careful to make it plain that it was only if the jury accepted the evidence of Gilbert, and if as the result of accepting that evidence they were satisfied that the prisoner had committed the first crime, that any question could arise of their deriving help from the occurrences on September 3, in connection with their decision on the charge made in respect of September 19.

The passages of which Mr. Clarke complains are as follows; in the first place on p. 3G of the transcript of the summing-up the Lord Chief Justice said: "You may come to the conclusion when I have dealt with the evidence—and this is a matter which you have to take into account very seriously with regard to Robinson—that there is a very striking similarity about these two hold-ups—a striking similarity—and that may help you when I have given you the directions later on as to how far you are entitled to take that into consideration. It may help you a good deal." Then on p. 8C the Lord Chief Justice says this: "Now let us come to the second raid. I have already reminded you that when these raids are going to be carried out you would expect a certain amount of preparation and a certain amount of rehearsal, and I am going to call your attention to some of the curious similarities between raid number 1 and raid number 2. You must consider each of these raids separately so far as Robinson

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is concerned, but if you come to the conclusion that he was the man who carried out the first raid, you are then entitled, as the House of Lords has recently laid down, in considering the second count, to take into account the similarity between the first and the second." I would emphasise those words " If you come to the conclusion that he was the man who carried out the first raid." Now, if there had been a similar direction to the jury in the case of HARRIS (*supra*) we apprehend that their Lordships might very well have taken a different view, because in that case the jury acquitted the appellant on the first seven charges. If, therefore, they had been directed that it was if, and only if, they found him guilty on the first seven charges that they could be assisted by that view in determining the eighth charge, the criticism their Lordships made would not have been the same and there might well have been a difference in the result. In that connection, before I finally depart from the report of HARRIS (*supra*), I desire to draw attention to what Lord Simon said (36 Cr.App.R. at p. 59; [1952] A.C. at p. 711): " Applying the above general propositions to the case before us, it appears to me that the only difficulty arises from the form of the summing-up. The learned judge, having decided that the eight counts should be tried together, did not warn the jury that the evidence called in support of the earlier counts did not in itself supply confirmation of the last charge." I have read what the Lord Chief Justice in the present case said at p. 8c. Then at p. 9 he said: " But it may strike you, ladies and gentlemen, that if Robinson is not a guilty man, he is a singularly unfortunate man. He is identified by different people, or said to be identified by two entirely different people, in respect of two entirely different raids." Then he goes on to make some observations about the area where the raids took place. If a jury are precluded by some rule of law from taking the view that something is a coincidence which is against all the probabilities if the accused person is innocent, then it would seem to be a doctrine of law

which prevents a jury from using what looks like ordinary common sense.

The next passage to which our attention has been drawn is at the bottom of p. 9: "Now, when you are considering his case"—that is, Robinson's case, because there was another man charged and acquitted in connection with the second crime—" you may find him not guilty of both raids; you can find him guilty of one and not guilty of the other, or you can find him guilty of both, and when you are considering the second raid, if you come to a conclusion of 'Guilty' with regard to the first raid, you would be entitled to say to yourselves: 'Well, we found he was guilty of the first raid'—if you do. I am not saying, of course, that you ought to, but if you do find him guilty of the first raid, you may say with regard to this second raid: 'That helps us. He has shown himself to be, by our finding of the first raid, a man who has been taking part in a highway robbery, and we find that the circumstances of the second highway robbery are very much similar to the first highway robbery' in the instances that I have pointed out to you or some of them."

There is one further passage to which I will refer, and that is on p. 11. He is talking there of the difficulties of identification where the person committing the crime has a mask over his face, and he says: "The most he can do, therefore, is to look at the people and see if there is any man there who in build, appearance, and so forth, resembles the man who stopped him, and that is where I say you will be entitled, only if you come to the conclusion that you ought to convict Robinson of the first hold-up, to use that fact as strengthening the case against Robinson with regard to the second hold-up. As I say, you must decide perfectly independently, but I advise you, first, to consider the Lyons' hold-up. If you are not satisfied of Mr. Gilbert's identification in the Lyons' hold-up, I should think you certainly would not be satisfied with Mr. Wood's identification in the second hold-up. If you are convinced by Mr. Gilbert's evidence, then you may find that

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that helps you to come to a conclusion as to whether or not Mr. Wood is right in his identification with regard to the second hold-up."

I have read those passages partly because they are the ones upon which Mr. Clarke relies in support of the appeal, but also because, having read them and having read the passages where the facts are set out in the report of HARRIS (*supra*), and the observations in the speeches, particularly the speech of Lord Simon, one can see at once that there are manifold and fundamental differences between the facts in the present case and the facts in HARRIS (*supra*). As to the principles, of course, we are helped by what is said in HARRIS (*supra*), as we should have been helped by what is said in the earlier cases. As to the application of the principles to the facts of this case, we feel that we can derive no real help from HARRIS (*supra*) at all.

Only one other case has been cited to us, and that is the recent case of STRAFFEN (*supra*) decided in this court. Again, there are differences in the facts, and again we recognise that the correct application of the clear principles to one set of facts is not assisted very much by referring to the application of those principles by the court to another set of facts; but, with that qualification, we are all clearly of opinion that this case is in substance indistinguishable from that case which was decided as recently as August, 1952, by this court. I say it is indistinguishable for this reason: In both cases the issue, and the only issue, was one of identification. It is by no means new law that, whilst evidence of other offences can never be adduced for the purpose merely of showing that a man is of criminal disposition and, as such, likely to commit a particular offence, one of the objects for which in a proper case evidence of other occurrences can be given is for the purpose of establishing identification. In HARRIS (*supra*) that is expressly recognised. There are, of course, other objects in other cases—negativing accident, proving *mens rea*, negativing mistake. In HARRIS (36 Cr.App.R. at p. 55; [1952] A.C. at

p. 708) Lord Simon expressly mentions one of the circumstances where such evidence may be admitted as occurring in a case where identity has to be proved. He says this: "It is the fact that he was involved in the other occurrences which may negative the inference of accident or establish his *mens rea* by showing 'system,' or, again, the other occurrences may sometimes assist to prove his identity, as, for instance, in PERKINS *v.* JEFFERY [1915] 2 K.B. 702." That is a case which I have not thought it necessary to examine in detail. We regard this as conspicuously a case of the kind where this other occurrence on September 3, if it were proved—I again emphasise the "if" just as the Lord Chief Justice emphasised it—to the satisfaction of the jury that the appellant was the driver of the Jaguar car concerned in that crime, might well assist to support the identification by Wood in respect of the second charge which was challenged by the appellant and was in fact the substance of his defence.

For these reasons, without discussing the details further, we are of opinion that there is no substance in the first ground of appeal, and the appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: Marie L. Bundy, for the appellant; The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE DONOVAN

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REGINALD JOHN WILSHER

Sentence — Corrective Training — Release on Licence — Offence Committed During Period of Licence—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 (1)—*Prison Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 52), *s.* 26.

Where a prisoner has been released on licence from a sentence of corrective training and commits an offence during the period of licence, a sentence of imprisonment may properly be passed for the offence; and the sentence should be one of imprisonment unless the Prison Commissioners have reported to the court that in their opinion a further period of corrective training may be of use; in which case the court may exercise its discretion whether to pass a sentence of imprisonment or corrective training.

TALBOT (*ante*, p. 23) referred to.

Application for leave to appeal against conviction.

The applicant was convicted at the Central Criminal Court on January 27, 1953, of shopbreaking and larceny and was sentenced to four years' corrective training. At that time he had been committed for trial to Essex Assizes on charges of officebreaking and larceny and causing grievous bodily harm to a police constable, and he was there sentenced for these offences on February 20, 1953, by Hallett J. to two years' corrective training to run consecutively to the sentence of four years.

No counsel appeared.

THE LORD CHIEF JUSTICE: There are three applications in the first case here, concerning the two Wilshers and a man

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named Reynolds, who were convicted at the Central Criminal Court of shopbreaking. Reginald Wilsher received four years' corrective training, Edward Wilsher received eight years' preventive detention, and Reynolds received eighteen months' imprisonment. They have all applied for leave to appeal against conviction but not against sentence, and the applications are refused. There is no ground whatever for interfering.

There is not the least possible ground for giving leave to appeal against conviction, but the learned judge—who is also a member of this court—in sentencing the appellant to two years' corrective training expressed the opinion that it would be as well if this court considered the matter, especially in view of TALBOT (*ante*, p. 23), and I think it is desirable to say a word.

Hallett J., having heard that the appellant had been sentenced at the Central Criminal Court to corrective training, felt in a difficulty, because this court has pointed out that it is undesirable, when a man is undergoing a sentence of corrective training and is brought before a court for another offence which had not been tried at the time when he received the sentence of corrective training, to pass a sentence of imprisonment, because that would mean that the moment when he finished his corrective training he would have to undergo imprisonment, which would very probably largely do away with any good he might have received in corrective training. The learned judge expressed some surprise—which this court shares—that in view of the facts of the case and his record, the appellant had been given a sentence of corrective training at the Central Criminal Court. The learned judge thought, in our opinion quite rightly, that the only thing to do was to add some period to his term of corrective training, and so he passed a sentence of two years' corrective training to follow consecutively on the sentence that he was already serving, which would mean that he would serve at least an additional year.

So far as that is concerned, the court entirely approves,

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but it does occasionally happen—and the attention of the court has been drawn to it by certain Recorders—that when persons who have been sentenced to corrective training are released on licence they commit offences while on licence. Since the Criminal Justice Act, 1948, where a prisoner earns a remission of imprisonment, the sentence comes to an end. If, for instance, a prisoner gets three years' imprisonment and he behaves himself in prison he will serve only two years, and he will then be discharged, and he is not discharged on ticket of leave or under licence, as in the old days. The sentence comes to an end. The position is not the same with corrective training or, as a matter of fact, preventive detention, but I will not deal with preventive detention at the moment. If a prisoner has been sentenced to corrective training, he can be released on licence, but he is then liable to be recalled if he commits an offence while he is on licence, and Recorders have recently found some difficulty in dealing with cases where young men have committed offences while they are on licence. They are told that the Commissioners will recall the prisoners, and the difficulty that has occurred to some Recorders is that very often the Commissioners report that these young men have shown that corrective training has done no good and they do not recommend them for a further sentence of corrective training. They have still got a portion of their sentences of corrective training to run, and the Prison Commissioners, under the Prison Act, 1952, have the power to make them serve it in prison; but if men who have been sentenced to corrective training commit offences while they are on licence from corrective training, there is no reason at all why a court should not pass a sentence of imprisonment, because it has been shown that corrective training has done no good.

This court is of opinion that a sentence of imprisonment should in those cases be imposed unless the Prison Commissioners have reported to the court of trial that they think that a further period of corrective training might be of some use;

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then the court can exercise its discretion whether to pass a sentence of imprisonment or corrective training. But unless there is that report, the only way in which the case can be dealt with is by passing a sentence of imprisonment.

In this case there is no application for leave to appeal against sentence, and therefore it is not necessary to say more than that the application for leave to appeal against conviction is refused.

Application refused.

BEFORE

MR. JUSTICE HALLETT, MR. JUSTICE STREATFEILD AND MR. JUSTICE DONOVAN

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MAX MARCUS BERNER
RENE REBECCA LEVINE
SADIE LEVINE

Customs and Excise—Carrying of Prohibited Goods—Intent to Avoid Prohibition—Exportation—Export of Goods Control Order, 1951 (*S.I.* 1951, *No.* 1053), *arts.* 1, 8 (1).

Exportation of goods under the Export of Goods Control Order, 1951, does not cease to be prohibited merely because the person taking them out of England intends to bring them back.

Where a person is charged with carrying goods the exportation of which is prohibited by the above-mentioned Order with intent to avoid such prohibition, the prosecution must prove that the accused person knew of the prohibition in question, and the jury should be so directed.

Appeals against conviction.

The appellants were convicted at Southampton Quarter Sessions on January 16, 1953, of being knowingly concerned in carrying prohibited goods, the exportation of which was

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prohibited by the Export of Goods Control Order, 1951, with intent to avoid such prohibition, contrary to section 186 of the Customs Consolidation Act, 1876, and article 1 of the Order, and were sentenced by the Recorder, Berner and Rene Rebecca Levine each to a fine of £1,000, and Sadie Levine to a fine of £500.

The appellant Berner, a widower, had been married to a sister of the other two appellants. All three were travelling to America together, and were amply provided with a travel allowance. Part of the goods in question was old-fashioned jewellery which had been left to the second and third appellants by their mother and a deceased sister, and had been insured for the return journey.

F. Ashe Lincoln, *Q.C.*, and *W. R. Hurst*, for the appellants.

G. D. Roberts, *Q.C.*, and *H. Elam*, for the Crown.

The arguments appear fully from the judgment.

HALLETT J.: In this case the appellants, Max Marcus Berner, Rene Rebecca Levine and Sadie Levine, the two women being sisters-in-law of the appellant Berner, were charged on an indictment containing only one count. The charge against them was that they "were knowingly concerned in carrying prohibited goods, namely," some articles of jewellery which were specified, "and one pair of antique silver candlesticks, the exportation of which is prohibited by the Export of Goods Control Order, 1951 (S.I. 1953, No. 1053), made by the Board of Trade by virtue of section 1 of the Import, Export and Customs Powers (Defence) Act, 1939, with intent to avoid such prohibition."

It is well settled that in order to be guilty of an offence of that kind, the accused person must know of the prohibition in question and, accordingly, there would seem to be three questions of fact to be decided by the jury, the first being:

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Were they carrying goods specified in the Schedule to the Order? The second is: Did they know of the prohibition against exporting such goods? and the third is: Knowing of the prohibition against export, were they carrying the goods with intent to avoid the prohibition?

The charge that was made against them was brought under article 1 of the Order. There is another article of the Order, article 8, sub-article 1, under which a person who is about to leave the United Kingdom, is obliged, if required so to do by an officer of Customs and Excise, to declare whether or not he has with him any goods the export of which from the United Kingdom is subject to any prohibition or restriction under that Order. He is also required to produce the goods, and there is also a provision for searching him. There are, therefore, two separate provisions in the Order, one prohibiting export and another, undoubtedly ancillary to the first, requiring the traveller to make a declaration and to submit to a search if so required.

Mr. Ashe Lincoln for the appellants has complained of the conviction upon four grounds. His first ground, and the one that is of general importance, is as follows: He submits that there is no export within the meaning of article 1 of the Order unless it appears that the goods are not going to be brought back to this country, and he has cited in support of that certain authorities, to which in a moment I will briefly refer. I say that that point is of importance, because Mr. Ashe Lincoln goes as far as contending that if the traveller tells the Customs officer who discovers the goods or to whom the goods are declared that it is intended to bring them back to this country at the end of a visit abroad, there is then no prohibition upon the export of those goods, unless that statement can be shown to be untrue. It is quite obvious that if that is the state of the law and the true application of article 1 of the Order, these restrictions upon export which were imposed by this Order and were not then imposed for the first time, will become in substance incapable

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of enforcement in very many cases. I point out once more that this Order was made in exercise of the powers conferred upon the Board of Trade by the Import, Export and Customs Powers (Defence) Act, 1939; and, in our opinion, it is not irrelevant to bear this in mind that when considering whether export ceases to be prohibited if the goods are going to be brought back.

We have been referred to several cases, and perhaps it would be as well to place on record at least some of them. The first case at which we were asked to look in this connection was MULLER *v.* BALDWIN (1873) 9 Q.B. 457. We were then asked to look at FOX *v.* KOOMAN (1919) 121 L.T. 575, and we were also asked to look at FRAILEY *v.* CHARLTON [1920] 1 K.B. 147. The court is of opinion that, so far from those cases supporting Mr. Ashe Lincoln's contention with regard to the meaning of exportation, they tend in the contrary direction, and that there is no substance in the first point.

Mr. Ashe Lincoln has three further points which require attention. The second point is this: It is quite plain that in deciding whether there is an intention to evade a prohibition, it may be very relevant for the jury to consider whether there has been a failure to declare. Failure to declare will go to the state of mind of the accused person; but the fact remains that the question whether the traveller knows of the prohibition of export and the question whether he knows of the obligation to declare are two separate questions. In the view of this court, it is essential that those two separate questions should be put clearly before the jury and put separately.

Mr. Roberts, for the Crown, has admitted that the way in which they were put, that is to say, intermingled, was technically incorrect, but we think that the error was more than an error of merely a technical character because we think it would prevent the jury from apprehending clearly that which they had to decide. As I ventured to say just before the

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adjournment, in a case where the jury may have been inflamed against the accused person by the unsuccessful attacks which were made on the truthfulness of the Customs officer, it was the more necessary, we think, that they should be very carefully and fully directed as to the applicable law. So much for the second complaint made by Mr. Ashe Lincoln. I have arranged his complaints in a different order because it is more convenient.

The third complaint he makes is this: He complains that there being here three accused persons, the summing up does not sufficiently separate and put before the jury the case as against each of them. They were referred to throughout as a party. Undoubtedly they were a party in the sense that they were all travelling together, but none the less the learned Recorder was quite right when he said at an early stage of his summing up that it was necessary for the jury to consider the case as against these three accused persons separately. So it was, but if it was necessary for the jury to consider the case against the three separately, then it was necessary for the learned Recorder in his summing up to do so also, and that, it seems to us, he did not really do. As an illustration of that, though not perhaps as a separate point, Mr. Ashe Lincoln complains that the learned Recorder never directed the jury that what was said by one or more of the accused behind the backs of the others was not evidence against the others, a very familiar principle. In this particular case, it may well have been that Mr. Roberts' answer to that point by itself would be satisfactory, because statements made by, for instance, Berner, behind the backs of the others, were statements to which the others agreed, and therefore no harm was done, but the failure to warn about the statements made and their effect as against the other accused reinforces, as it seems to us, and illustrates the complaint which Mr. Ashe Lincoln makes that here the cases against the three were never really put with a sufficient degree of separation.

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The remaining complaint he makes is that as regards the male appellant, Berner, there was not sufficient evidence to support the conviction. We think that there was just enough to entitle the jury to convict if they thought it proper to do so, though the case against him may perhaps be described as thin, but for the other reasons which I have given, we are of opinion that the convictions cannot be upheld, and accordingly the court will order them to be quashed.

Convictions quashed.

Solicitors: A. Kramer & Co., for the appellants; The Solicitor, Customs and Excise, for the Crown.

BEFORE

MR. JUSTICE HALLETT, MR. JUSTICE STREATFEILD AND MR. JUSTICE DONOVAN

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WINIFRED MARY YINDRICH

Appeal—Question of Law Involved—Desirability of Certificate from Trial Judge—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3 (*a*)—*Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 38 (2) (*a*).

Where the court of trial thinks that there is a point of law involved which it would be proper for the Court of Criminal Appeal to investigate, although the convicted person has, under section 3 (*a*) of the Criminal Appeal Act, 1907, a right of appeal without leave on a ground which involves a question of law alone, it is none the less desirable that the trial judge should grant a certificate that the case is fit for appeal, since, under

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section 38 (2) (*a*) of the Criminal Justice Act, 1948, if a certificate has been granted, on the appeal being dismissed sentence will run from the date of conviction, whereas, if no certificate has been granted, the sentence will run from the date of conviction only if the Court of Criminal Appeal so directs.

Appeal against conviction.

The appellant was convicted at West Kent Quarter Sessions on May 11, 1953, of embezzlement and was sentenced by the Chairman to four months' imprisonment.

The case is reported on a point of practice only.

Sir Frank Soskice, Q.C., and *Basil Wigoder*, for the appellant.

D. A. Hollis, for the Crown.

HALLETT J. [after delivering the judgment of the court allowing the appeal]: There is one more matter to which I ought to draw attention. The learned Chairman, who took considerable trouble over this case and made a careful report to the court, intimated that he would have been prepared to give a certificate that this was a proper case for appeal. Mr. Wigoder said: "Sir, would you grant a certificate of appeal in this case?" (The Chairman): "Yes. I will grant any necessary certificate that a point of law is involved, but I do not think that on a point of law you need it, do you?" (Mr. Wigoder): "No, strictly speaking I do not; but it always saves a lot of arguing, I find, if it exists." (The Chairman): "If it is necessary I will grant one." The learned Chairman has reported to this court to the same effect, that he was prepared, if necessary, to grant the certificate.

There is a matter of procedure which we think was, perhaps, overlooked. It is true that under section 3 (*a*) of the Criminal Appeal Act, 1907, a person convicted on indictment may appeal under the Act to the Court of Criminal Appeal against his conviction on any ground of appeal which involves a question of law alone, but none the less we desire to point out that if the

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court of trial thinks that the point indicated is such that it would be right for it to be investigated here, a certificate should be granted, although under section 3 (*a*) an appeal may be possible without it. The reason is that under section 38 of the Criminal Justice Act, 1948, in the event of the appeal being dismissed, if there is no certificate time will run from conviction only if the court so directs, whereas if a certificate is granted by the learned judge, Recorder or Chairman, as the case may be, time will run from conviction without the court so directing. Therefore, the existence of a certificate is a very substantial advantage to the appellant as regards the length of time which has to be served, although appeal to this court may be possible without it.

Conviction quashed.

Solicitors: Humphrey Razzall & Co., for the appellant; The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PARKER AND MR. JUSTICE DONOVAN

1953
July 6

KENNETH ALFRED SIMONS
ALAN SIMONS

Sentence—Offence Taken into Consideration—Offence which Court Has No Jurisdiction to Try—Offence Relating to Driving, etc., of Motor-car.

A court should not take into consideration as an outstanding charge a charge which it has no jurisdiction to try, or an offence under the Road Traffic Acts relating to the driving, insurance or otherwise of a motor-vehicle. In the latter class of case,

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where the offence is proved, a court is required to take certain steps with regard to indorsement of and disqualification from holding a driving licence, and such steps can be taken only if there is a conviction and cannot be taken, therefore, if the charge is taken into consideration as an outstanding charge.

The applicant was committed for trial on a charge (inter alia) of being disqualified from holding a driving licence. Such a charge is indictable only if the prisoner has exercised his option of trial by jury, and as there was some doubt whether this had taken place, no count for that offence was included in the indictment. At quarter sessions the Recorder was asked and agreed to deal with this matter on the basis of an outstanding charge.

Held, that for the aforementioned reasons, this course ought not to have been taken, and that the proper course would have been for a count for the offence to be included in the indictment, for evidence to be called on the question whether the applicant had exercised his option or not, and if it were established that he had not, for the court to quash the count.

Applications for leave to appeal against conviction.

The applicants were convicted at Leicester City Quarter Sessions on April 11, 1953, of storebreaking and larceny, receiving, and taking a motor-vehicle without the consent of the owner, and Kenneth Alfred Simons was also convicted of dangerous driving, and an offence of driving while disqualified was taken into consideration. Kenneth Alfred Simons was sentenced by the Recorder to three years' corrective training, and Alan Simons to four years' corrective training.

The applicant Kenneth Alfred Simons had been committed for trial on a charge (inter alia) of driving a motor-vehicle while disqualified from holding a driving licence, an offence which is indictable only if the prisoner has exercised his option of trial by jury. As there was some doubt whether the applicant had done this, counsel for the prosecution did not include a count for this offence in the indictment. At the request of both counsel, the Recorder agreed to deal with this matter as an outstanding charge to be taken into consideration.

No counsel appeared.

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THE LORD CHIEF JUSTICE: The applicants, two brothers, were charged at Leicester City Sessions on an indictment which alleged against one or other of them, and in some cases both, the taking of a motor-vehicle without consent, storebreaking and other offences. Kenneth pleaded Guilty to taking a motor-vehicle, receiving and dangerous driving, one other offence was taken into consideration and he received three years' corrective training. It is with regard to the offence that was taken into consideration that this court desires to make a comment because we are not giving leave to appeal. When before the magistrates, he had been charged also with the offence of driving a motor-vehicle while disqualified. That is a summary offence punishable with six months' imprisonment and it is one of the offences—I think the only offence—in the Road Traffic Acts for which it is provided that the sentence shall be one of imprisonment unless special circumstances are found. The applicant had been committed for trial by the magistrates for this offence of driving while disqualified, but the offence could be indictable only if the prisoner claimed the right to be tried by a jury under the provision formerly contained in section 17 (1) of the Summary Jurisdiction Act, 1879 (rep.) and now contained in section 25 (1) of the Magistrates' Courts Act, 1952, which provides that if a person is liable to be sentenced to more than three months' imprisonment, he can elect to be tried by a jury. When the case came to quarter sessions, the applicant was not indicted for that offence because there seemed to be some curious difference of opinion whether he had exercised his option or not. I think, in the circumstances, it would have been better if he had been indicted as he had been committed for trial, and evidence given by the magistrates' clerk whether he had elected to go for trial or not. But as there was this difference of opinion, counsel for the prosecution thought it better not to include a count for this offence in the indictment, but asked the learned Recorder to quash the committal. I do not know how a committal is quashed, and I do not think it can be; I think the only thing

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the court can do is to quash the count. That was the first thing about which this court thinks there was a mistake made here. If the applicant had been indicted, as he ought to have been, the question could then have been considered whether he had elected to go for trial or not; and if the Recorder came to the conclusion that he had not elected to go for trial, he could have quashed the count. What happened was that both counsel agreed that it would be an excellent thing to have the offence of driving while disqualified taken into consideration if there was a conviction, as there was. So the Recorder was asked and said that he would take it into consideration.

There are two objections to that course. The first is that if quarter sessions have no power to try the charge, they cannot take it into consideration. This court has always said that if a court has no power to try a charge, it must not take it into consideration when passing sentence for another offence. This court has also laid down in quite unmistakable terms that offences in relation to the driving of motor-cars are not offences which ought to be taken into account in any court where there is a conviction for some other offence, for this reason, that there are special provisions in the Road Traffic Act, 1930, ss. 7 and 8, with regard to indorsement or disqualification from holding a licence, and such disqualification or indorsement can only follow on a conviction. Over and over again it has been pointed out that because a court says it takes a matter into consideration that does not amount in law to a conviction. This court, therefore, desires to repeat once more first, that if a court has no jurisdiction to try a particular offence, the court ought not to take that offence into account when passing sentence for an offence which the court has power to try. Secondly, motor-car offences, that is to say, offences against the Road Traffic Acts in relation to the driving, insurance or otherwise of motor-vehicles, ought not to be taken into account, but should be left for separate prosecution because the law requires magistrates to take certain steps with regard to indorsement or disqualification from holding a licence, which

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can only be done if there is a conviction. That cannot be done if the charge is only taken into account.

There is no ground for interfering with either sentence which was passed in this case, which was in one case three years' corrective training and, in the other case, four years' corrective training. Therefore, these applications for leave to appeal are refused.

Applications refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PARKER AND MR. JUSTICE DONOVAN

HAROLD ERNEST MARKWICK

1953
July 13

Sentence—Heavy Fine—Larceny from Fellow-Member of Club.

A sentence of a very heavy fine is appropriate only in cases where Parliament has particularly provided for it, as in some cases of fraudulent practices or offences under the Defence or similar Regulations, where the object of the prosecution is largely to prevent the offender from obtaining financial benefit from his breach of the law.

Sentence of a fine of £500 for larceny from a fellow-member of a club varied to one of imprisonment as being wrong in principle.

Appeal against sentence.

The appellant was convicted at Lichfield Quarter Sessions on May 28, 1953, of larceny of 2s. 6d. and was sentenced by the Recorder to a fine of £500.

On March 1, 1953, five marked coins were put in the pocket of a pair of trousers hanging in the changing room of the Tamworth Golf Club and belonging to a member. The appellant, a member of the club, played a round of golf with the professional. He then returned to the changing room and later went to pay the 3s. 6d. fee. He paid with a half-crown piece which was one of the marked coins.

Norman A. Carr, for the appellant.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: In this case the court has a serious and painful duty to perform. [His Lordship stated the facts and continued:] The Recorder passed a sentence which

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was about as wrong in principle as any sentence could be, and not merely because of the amount. The appellant had thrown suspicion on fellow members as well as the servants of the club.

Before the Criminal Justice Act, 1948, it would have been impossible for the Recorder to have imposed a fine. Except in the case of manslaughter, a court had no power to impose a fine on conviction on indictment of felony, though magistrates could do so in some cases on summary conviction. That restriction had often been found hampering, and the position was altered by Parliament. When the change was first mooted, it was, to my knowledge, opposed by a very high authority on the ground that it would give persons of means an opportunity of buying themselves out of being sent to prison, and therefore one has to take great care that there should be no suggestion that there is one law for the rich and one for the poor.

A fine of £500 is totally inappropriate in a case of larceny of the present sort. Heavy fines are appropriate only where Parliament has particularly provided for them, especially in some cases of fraudulent practices or offences under the Defence or similar regulations where the object of the prosecution is largely to prevent the offender from obtaining financial benefit for his breach of the law.

In the opinion of this court, this was not a case in which a fine should have been imposed. The gravamen of the offence was not only its essential meanness, but also the aura of suspicion which must have been thrown over the servants and other members of the club. The court has, therefore, come to the conclusion that it is its duty to set aside the fine of £500, and substitute a sentence of imprisonment for two calendar months. The period would have been longer but for the fact that so long a time has elapsed since the date of conviction.

Sentence varied.

Solicitors: Booth & Blackwell, agents for A. Parton-Smith & Co., Birmingham, for the appellant.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PARKER AND MR. JUSTICE DONOVAN

JOHN GEORGE DURKIN

1953
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Court-Martial—Procedure—Power of Convening Authority to Dissolve—Charge-Sheet Not Signed by Commanding Officer of Accused.

Although no such power is expressly conferred either by the Army Act or by the Rules of Procedure, 1940, the convening authority has power to dissolve a court-martial, before it has come to a decision, if the authority considers that the proceedings are in some way irregular or that matters have arisen which are prejudicial to the prisoner.

There is no provision either in the Army Act or the Rules of Procedure which requires the charge-sheet to be signed by the commanding officer of the prisoner, and a court-martial has, by virtue of rule 56, jurisdiction to try a prisoner although the charge-sheet has been signed by some other person.

Appeal against conviction.

The appellant, Private (formerly Corporal, Acting-Sergeant) John George Durkin, was convicted by a District Court-Martial on two charges of stealing public property from the cookhouse and was sentenced to be reduced to the ranks.

In December, 1952, the appellant was in charge of the main cookhouse at the War Office Selection Board, Barton Stacey, and his commanding officer was Major Drew-Wilkinson, the Camp Commandant. The appellant was handed over by a civil magistrate to a military escort, by whom he was brought before Major Littledale, the camp commandant designate, who remanded him in close arrest. On December 22, at Major Drew-Wilkinson's request, Major Littledale dealt with the appellant and released him to open arrest. Major Littledale told

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the appellant that he would be confined to camp and that he was to carry out his normal duties in the cookhouse. On January 7, 1953, Major Littledale was taken on strength of the War Office Selection Board as Camp Commandant and on January 9, 1953, the appellant was brought before him and relieved of his duties, remaining in open arrest. The appellant was remanded for trial by Major Littledale and the charge-sheet was signed by Brigadier W. H. Ray, Commandant of the Board.

A District Court-Martial assembled to try the accused on the charges. In bar of trial the appellant pleaded condonation and the court-martial allowed the plea and adjourned. The confirming authority did not confirm the finding.

The matter was referred to the Directorate of Army Legal Services and an officer wrote to the convening officer pointing out that the charge-sheet was not signed by the appellant's commanding officer and said that the court might not have jurisdiction to try the accused. Accordingly the first court-martial was dissolved and a new District Court-Martial tried the appellant on the same charges of stealing set out in a charge-sheet signed by Major Littledale. The appellant pleaded Not Guilty to both charges and was found Guilty.

S. C. Silkin, for the appellant.
E. Garth Moore, for the Crown.

THE LORD CHIEF JUSTICE: The appellant, who is a corporal, acting-sergeant, and a camp cook or in charge of the cookhouse, appeals against conviction by a court-martial, having been found guilty of two charges of stealing public property. He was in charge of the cookhouse at the War Office Selection Board Camp at Barton Stacey, and the public property that he stole was twenty eggs, a quantity of margarine, one pound of butter, some Brussels sprouts and some plates. He was sentenced to reduction to the ranks, and he appeals on grounds which would neither restore, as far as I can see, his character as a corporal, nor his competency as a cook, but in which he raises highly complicated and highly technical points which at

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any rate have this merit, that the court will be able to give a decision on this matter which, curiously enough, does not seem to be dealt with in terms in the Army Act or in the Manual of Military Law.

To appreciate the points which arise in the appeal, it is necessary to give a short history of the matters which led up to the court-martial. December 1, 1952, was the day upon which it was alleged that the appellant stole the first part of the property which formed the subject of the charge, and at that time a Major Drew-Wilkinson, who was the Camp Commandant at the War Office Selection Board Camp, Barton Stacey, was on the point of handing over his command to another officer. On December 10, Major Littledale arrived at the camp to take over the duties of Camp Commandant. On December 18, there occurred the second incident, which was the theft of the Brussels sprouts, and the police were brought in to investigate. On December 19 the police interviewed the appellant and on the 20th he was brought before a bench of magistrates. He was then remanded, quite properly, to an escort so that he might be dealt with by his commanding officer or by court-martial, as the case might be, which is the proper procedure where a soldier is charged with committing an offence with regard to Government property on Government property. On December 22, Major Drew-Wilkinson, who was about to leave, asked Major Littledale to deal with the case. The appellant had been in close arrest since he had been remanded by the magistrates to military custody, but, on December 22, Major Littledale, who at this time knew nothing whatever about the case, released him to open arrest, which meant that he was confined to camp, and ordered an abstract of evidence to be taken. He told the appellant that he would be confined to his quarters, the precincts of the camp, and that he was to carry out his normal duties in the cookhouse. On December 27 the appellant was given a copy of the abstract of evidence by Major Drew-Wilkinson, and by January 6, 1953, Major Littledale had taken over command. On January 9, the abstract of evidence having been completed, the appellant was brought

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before Major Littledale and relieved of his duties, but he remained in open arrest. On January 19 the appellant was remanded by Major Littledale for trial on these charges. It seems that the charge was signed by a brigadier and not by Major Littledale as the commanding officer, and on January 22 the court-martial was held. There was no objection by the appellant to the composition or jurisdiction of the court, and he took no point that the commanding officer had not signed the charge-sheet. The only plea that was put forward on his behalf was a plea in bar under rule 36 of the Rules of Procedure, which provides: " The accused at the time of his general plea of ' guilty ' or ' not guilty ' to a charge for an offence, may offer a plea in bar of trial on the ground that . . . (ii) the offence has been pardoned or condoned by competent military authority." He entered a plea that the offence had been condoned, apparently because he had been told by Major Littledale that, while he was in open arrest, he was to go on with his duties in the cookhouse.

The court-martial having heard the evidence, held that the offence had been condoned, but their finding was of course subject to confirmation, and the confirmation with regard to this matter is dealt with by Rule of Procedure 36, Manual of Military Law, p. 456, paragraph (D): " If the finding that a plea in bar is proved is not confirmed, the court may be re-assembled by the confirming authority, and proceed as if the plea had been found not proved."

The next thing that happened was this: The Directorate of Legal Services, before whom this matter came, observed that the charge-sheet had not been signed by the commanding officer but by the brigadier, and accordingly a letter was written to the General Officer Commanding, Aldershot District, in which it is said: " It became apparent during the first hearing of this case on January 22 that the charge-sheet before the court was not signed by the commanding officer of the accused, that is to say, it was not signed by the Camp Commandant who was the person who investigated the case and remanded the accused for trial, but by Brigadier Ray, the Commandant. It

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is a matter for you whether you feel that this charge-sheet is in order, but you may well feel that the court would not have jurisdiction to try the accused upon such a charge-sheet, and the best course would now be to dissolve the court at present in being and convene a new court; it would also be necessary for a new charge-sheet to be made out and signed by the Camp Commandant who should remand the accused upon it."

Our attention has not been called to any provision of the Army Act or of the Rules of Procedure, which requires the charge-sheet to be signed by the commanding officer, except that in the form which is in the Schedule to the Rules of Procedure there is a place for the signature of the commanding officer, the object of which appears to the court to be to indicate that the commanding officer has remanded the prisoner for trial. There is no special provision about this, and by rule 56 of the Rules of Procedure, it is provided: "Whenever it appears that a court-martial had jurisdiction to try a person and make a finding and that there is legal evidence or a plea of Guilty to justify such finding, such finding and any sentence which the court-martial had jurisdiction to pass thereon may be confirmed, and if so confirmed shall be valid, notwithstanding any deviation from these rules or notwithstanding that the charge-sheet has not been signed by the commanding officer or the convening officer, provided that the charges have, in fact, before trial been approved by the commanding officer and the convening officer, or notwithstanding any defect or objection, technical or other, unless it appears that any injustice has been done to the offender; but nothing in this rule shall relieve an officer from any responsibility for any wilful or negligent disregard of any of these rules."

It is quite clear that this point which was raised by the Directorate of Legal Services was quite immaterial. If the court-martial had proceeded, rule 56 would have prevented any question arising with regard to the fact that the form had not been signed by the commanding officer, because it is quite clear that no injustice had been done to the appellant, and the court-martial could have proceeded with the trial in the ordinary

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way because, once the finding that the offence had been condoned was not confirmed, then, by reason of the provision I have referred to a moment ago, the court-martial would have continued to deal with the case and the prisoner would have been called upon to plead Guilty or Not Guilty to the offence. If he pleaded Not Guilty, the trial would have continued. However, on account of this letter which the General received, it was ordered that the court-martial should be dissolved, and that a further hearing should take place before another court-martial. It is observable here that the proceedings before the court-martial resulted in no finding whatever, because the finding of a court-martial is of no validity until it has been confirmed, and so the court-martial's finding that the plea in bar was good and that the offence had been condoned was of no validity as it had not been confirmed. The fact that that finding had not been confirmed of course did not amount to an acquittal; it simply amounted to an expression of opinion that the finding was wiped out and that court-martial, if it had not been dissolved, would have been able to continue the hearing of the offence. There had been no decision on anything except the decision of the confirming officer that the plea in bar was not proved. Section 54 (6) of the Army Act provides in terms: "Subject to the provisions of this Act with respect to the finding of acquittal, the finding and sentence of a court-martial shall not be valid except in so far as the same may be confirmed by an authority authorised to confirm the same." It is perfectly clear that the proceedings of a court-martial are not completed until the finding has been confirmed or not confirmed, as the case may be.

A second court-martial, accordingly, was convened to try the accused, and it was that court-martial that found him guilty on the two charges. So far as that finding is concerned, the court sees no ground whatever on which they can differ from it, but it is argued that there was no power to dissolve the first court-martial before it reached a decision and *a fortiori* no power to direct a trial before another court-martial. It is curious, no doubt, that there is no express power of dissolution

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given by the Army Act or the Rules of Procedure except in so far as the matter is dealt with by section 53 of the Army Act, which provides that a court-martial shall be dissolved in certain circumstances, that is, compendiously, if the President dies or members of the court die or cannot attend and the court is reduced below its legal minimum, or if on account of the illness of the accused it is impossible to continue the trial. In those circumstances, the court-martial shall be dissolved, but there is no other provision with regard to the dissolution of a court-martial.

Rule 66 of the Rules of Procedure deals with the matter in this way: "Where, in consequence of anything arising while the court is sitting, the court is unable by reason of dissolution (as specified in section 53 of the Army Act, or otherwise), or of the absence of the President, to continue the trial, the President, or in his absence, the senior member present, will immediately report the facts to the convening authority." Of course, that rule does not apply to such a case as this because if the convening authority has dissolved the court, there is no necessity to report to the court that the authority has dissolved it. Mr. Garth Moore has contended that on what he compendiously called the common law of the Army there is always power to dissolve a court-martial. It might be said that there could not be such a power because that would enable the convening authority, if they thought the court-martial was not taking a view of the case which commended itself to the convening authority, to dissolve the court-martial and appoint another court; but we cannot and do not assume that a convening authority would ever act as improperly as that, and no doubt if they did, proper disciplinary action would be taken and the matter would be raised in Parliament.

Considering that a court-martial is to some extent like a bench of magistrates, judges of both law and fact, it might be most prejudicial to soldiers if the convening authority had not power on a proper occasion to dissolve the court-martial and order proceedings before another court. For instance, if during the hearing of the case some matter highly prejudicial to the

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prisoner came out, or if evidence was wrongly received and it came to the knowledge of the convening authority that this evidence had been wrongly received—if, for instance, evidence of bad character which ought not to have been given was given against an accused person—it would be highly prejudicial and wrong that that court-martial should proceed. The only course then would be to dissolve the court-martial and have the accused retried before another court. In fact, the position is exactly the same as in the civil courts where, during the course of a trial something occurs which, in the opinion of the presiding judge, is so prejudicial to the prisoner that the only proper course is to discharge the jury and begin the case over again. I suppose there are always three or four cases a year in which a matter of that sort arises. During a prisoner's cross-examination or during the evidence of a police officer, owing to an unguarded question or an unguarded answer, the fact that a prisoner has previous convictions is brought out in court, and thereupon, as has often been said in the Court of Criminal Appeal, the right course in those circumstances is for the judge to stop the trial, discharge the jury and for the proceedings to begin over again. There is no statute which permits the court to do that, but it is a power which the court has always assumed, and it is a power which it is necessary in the interests of justice that the court should have. There is no question now that the court has that power, and it is a power which the court constantly uses. For the same reason, it is clear that the convening authority must have power to dissolve a court-martial if they consider that the proceedings are in some way irregular or that matters have arisen which are prejudicial to the prisoner. It has always been assumed that there is this power, and if we were to hold now after all these years that the convening authority had no such power and that once a court-martial was in existence, although it had come to no decision, it must continue to be in existence, it is quite obvious that very great prejudice might be caused to accused persons for which there would really be no remedy. We are, therefore, of opinion that it was within the power of the convening authority to

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dissolve this court-martial and order the trial before another one, although we think that the technical point that was taken by the Directorate of Army Legal Services really had no substance in it. The fact that this document had not been signed by the commanding officer was not a defect which was in any way fatal and, as I have already pointed out, rule 56 of the Rules of Procedure, which deals with the matter, would have afforded an answer if any question had afterwards been raised. No objection was taken by the accused person to being tried by this court-martial. Therefore, we think there was no necessity to dissolve the court-martial, but we cannot doubt that the convening authority had power to dissolve the court-martial if it seemed fit. Therefore, there is no objection here to the fact that the case was brought after the plea in bar had been disallowed, and there is no objection to the fact that another court-martial was assembled to try the general issue. The power of dissolving the court-martial could not, I think, be exercised if the court-martial had once come to a decision, but where they had come to no decision there can be no objection as far as this court can see.

When the case came before the second court-martial, the accused did not put forward the plea in bar again, and it is quite understandable why he did not do that, because once the plea in bar had been disallowed by the confirming authority it would have been idle for him to put it forward again at the second hearing; but the facts of the case are before this court, and if this court thought that the plea in bar ought to have succeeded on the first hearing, that is to say, that the confirming officer was wrong in quashing or not confirming the plea in bar, this court would not hesitate to allow the point to be raised and allow the matter to be argued before it.

The question is whether there was condonation. The condonation that is suggested is that when Major Littledale ordered the accused out of close arrest into open arrest and told him he was going to take a summary of evidence, and told him to resume his duties in the cook-house, that meant that he was condoning the offence. The court cannot see here any evidence

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on which it can possibly be said that Major Littledale, who was the only person who could have condoned the offence, in any way condoned it. Condonation means a wiping out or forgiveness of the offence in some way. The passage from Clode to which our attention has been called says: "When any offence has been committed by an officer or soldier, and that offence not punished or forgiven, but advisedly overlooked, the person implicated being continued in his employment—these circumstances are held to be a good plea of condonation and a bar to further proceedings." In this case the accused man was informed that he was to remain in open arrest, that a summary of evidence would be taken and that he could continue or was to continue his duties meanwhile. How can that be said to be a condonation of an offence of which Major Littledale, who had only just arrived at the camp, could have any knowledge? It is difficult to understand how anyone can condone an offence till he knows that an offence has been committed, and as there was no summary of evidence at the time when Major Littledale took the steps with regard to the accused, it seems to the court that there was no evidence on which the first court-martial could find condonation. Therefore, the decision of the confirming officer refusing to confirm the finding was perfectly right. In those circumstances, the plea of condonation could not have been successfully raised at the second trial, and as there is no other ground on which it is suggested that the proceedings were in any way wrong, and, as it is not for this court to examine the evidence whether the accused stole the property or not, this appeal is dismissed.

Appeal dismissed.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PARKER AND MR. JUSTICE DONOVAN

DIRECTOR OF PUBLIC PROSECUTIONS *v.* ROGERS

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Indecent Assault — Child — Invitation to Handle Defendant Indecently—No Use of Compulsion—No Acting in Hostile Manner.

On two occasions, the respondent, when alone in the house with his daughter aged 11, put his arm round her and led her upstairs, and when they were upstairs exposed his person and invited her to masturbate him, which she did. No compulsion or force was used by the defendant, and the child neither objected nor resisted, but submitted to the defendant's request. Justices dismissed informations charging the defendant with indecent assault on the child.

Held, that as the defendant had not used compulsion or force, or acted in a hostile manner towards the child, there had been no assault, and consequently no indecent assault on her, and that the decision of the justices was, therefore, right.

FAIRCLOUGH *v.* WHIPP (1951) 35 Cr.App.R. 138 followed.

Case stated by Kent justices.

At a court of summary jurisdiction at Hythe two informations were preferred by the prosecutor, the Director of Public Prosecutions, charging the defendant, Sidney Frank Rogers, with indecent assault on his daughter, aged eleven. On two occasions the defendant, being alone in the house with his daughter, put his arm round her shoulder and led her upstairs. On the first occasion she made no objection or resistance, and no force was used by the defendant. When they were upstairs, the defendant exposed his person and told the child to masturbate him, which she did, though she did not wish to do so. On the second occasion, the child, knowing what was the nature of the defendant's intention towards her, did not wish to

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accompany him upstairs, but nevertheless she neither objected nor resisted, but submitted to the defendant's request and similar conduct took place.

It was contended on behalf of the prosecutor that the placing of the defendant's arm round the child's shoulders could constitute an assault, and would be an assault in the absence of consent by the child, and that, as there were circumstances of indecency accompanying this act, the child could not consent to it, and therefore the justices could hold that there had been an assault; that the facts proved disclosed more than a mere invitation to the child to touch his person; further, that an assault could be inferred from the particular circumstances and the touching of the defendant's person by the child was an involuntary act on her part by reason of his exercising his parental authority. It was contended on behalf of the defendant that there was no case for him to answer on the grounds (i) that the acts of masturbation were invitations made by him to the child to touch his person, which alone could not constitute an assault on her, and (ii) that a hostile act was a necessary ingredient of an assault and no evidence had been adduced of any such hostile act.

The justices, holding that they were bound by the decision in FAIRCLOUGH *v.* WHIPP (1951) 35 Cr.App.R. 138 dismissed the informations.

The Director of Public Prosecutions appealed.

Mervyn Griffith-Jones for the appellant.
Dudley Collard for the respondent.

THE LORD CHIEF JUSTICE: This is a case stated by justices for the county of Kent sitting at Hythe, before whom the respondent was charged with indecent assault on his daughter aged eleven.

The circumstances of the case are revolting, but the fact that the respondent will be held up to execration by every decent-minded person in the world is all the more reason why the court has to be careful that it does not find that a criminal

offence has been committed if the circumstances do not bring the respondent within the criminal law, however much one may regret that they do not. Obviously, the justices dismissed this information with great reluctance. They did so because they felt, and I think rightly, that they were bound by decisions of this court. In giving those decisions this court has always expressed the greatest regret that it had to decide the case in the way in which it did, and endeavoured to call the attention of the legislature to the desirability of making statutory provision that persons who consciously commit filthy acts in the presence of children, more especially those who invite children to acts of indecency, should be made guilty of a criminal offence.

The facts of this case are that this disgusting father, being alone in the house with his little daughter, put his arm round her and said "Come upstairs" and, as the justices find, she made no objection or resistance and no force was used on either of the two occasions. On the first occasion she made no objection or resistance and no force was used, and when the child was upstairs with him he exposed his person and told her to masturbate him, which she did not want to do. The justices say that on both occasions the child obeyed the respondent, though she did not wish to do so, but she apparently did not show outwardly any dissent from doing it, and at any rate there is no finding that he forced her to do it. On the second occasion, it is found that the child "knowing what was the nature of the respondent's intention towards her, did not wish to accompany him upstairs but nevertheless neither objected nor resisted but submitted to her father's request."

Before a man can be found guilty of an indecent assault it has to be found that he was guilty of an assault, for an indecent assault is an assault accompanied by indecency, and if one could show here that the respondent had done anything towards his child which by any fair use of language could be called compulsion, or acted, as I have said in other cases, in a hostile manner towards her, that is, with a threat or a gesture which could be taken as a threat, or had pulled a reluctant

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child towards him, that would undoubtedly be an assault, and if it was accompanied by an act of indecency, it would be an indecent assault.

The first case to which we were referred, BEAL *v.* KELLEY (1951) 35 Cr.App.R. 128, was really quite a different case, because there the defendant exposed himself to a boy and asked the boy to handle him and, when the boy refused to do so and began to go away, the defendant ran after the boy and got hold of him and pulled him towards himself. As we have pointed out, there can be an assault without battery, and in that case there was undoubtedly an assault because the boy wanted to get away from this disgusting behaviour. There was an assault; it was accompanied by indecency, and therefore there was an indecent assault. On the other hand, in FAIRCLOUGH *v.* WHIPP (1951) 35 Cr.App.R. 138, the respondent exposed himself in the presence of a girl aged nine, saying "Touch it," which she did. We had to hold that that was not an indecent assault, because there was no authority that, where one person invites another to touch him, that can amount to an assault on the person who is invited.

I think the justices were right in saying that in principle they could not distinguish the present case from FAIRCLOUGH *v.* WHIPP (*supra*). It is quite true that there might be a case in which the evidence showed that what was being done was really done against the will of the child, if the father had used compulsion on the child. Here no force was used and nothing was done except what any father may do, and however much we may regret that we cannot punish the respondent for doing an act which deserves the reprobation of every decent man, we feel that the justices came to a right decision and we reluctantly dismiss this appeal.

PARKER J.: I feel constrained to agree, but with extreme reluctance.

DONOVAN J.: I agree.

Appeal dismissed.

Solicitors: G. F. Hudson, Matthews & Co., agents for Frederic J. Hall, Folkestone, for the respondent.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PARKER AND MR. JUSTICE DONOVAN

POPE *v.* CLARKE

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Road Traffic—Dangerous Driving—Notice of Intended Prosecution —Time of Offence Wrongly Stated—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

A notice of intended prosecution under section 21 (*c*) of the Road Traffic Act, 1930, may remain valid despite the fact that the time of the alleged offence is incorrectly stated therein.

Dictum of Lord Coleridge C.J. in WOODWARD *v.* SARSONS (1875) L.R. 10 C.P. 733 at p. 746 applied.

Case stated by Essex justices.

At a court of summary jurisdiction at Brentwood an information was preferred by Walter Steven Pope, a police officer ("the prosecutor") charging Harry William James Clarke ("the defendant") with driving a motor-vehicle in a manner dangerous to the public, contrary to section 11 of the Road Traffic Act, 1930.

At or about 11.15 a.m. on December 4, 1952, a collision occurred between a motor-car driven by the defendant and a motor-lorry. A notice of intended prosecution was sent to him by registered post in accordance with section 21 (*c*) of the Road Traffic Act, 1930, which stated that "at or about 1.15 p.m. on . . . you did drive . . . in a manner which was dangerous to the public. . . ." The justices were of the opinion that the erroneous statement of the time invalidated the notice and they dismissed the information without hearing any evidence on behalf of the defendant. The prosecutor appealed.

Section 21 of the Road Traffic Act, 1930, provides: "Where a person is prosecuted for an offence . . . relating . . . to . . .

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dangerous driving . . . he shall not be convicted unless . . . (*c*) within . . . fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was . . . sent by registered post to him . . . ."

L. A. Moules for the appellant.
Lionel Jellinek for the respondent.

THE LORD CHIEF JUSTICE: This is a case stated by justices for the county of Essex, before whom the respondent was charged with the offence of driving a motor-vehicle in a manner dangerous to the public contrary to section 11 of the Road Traffic Act, 1930.

The facts found by the justices are that at 11.15 a.m. on December 4, 1952, a collision occurred between an Austin motor-car and a motor-lorry. The respondent was involved in that collision, which occurred " on the road leading from Brook Street, Brentwood to Ingrave at Mascalls Lane, Great Warley, at the junction with Warley Hill." At the time of the collision the respondent was the driver of the Austin motor-car. He was not warned at the time that a prosecution would take place, and as the summons was not served actually within fourteen days, it was necessary that a notice under section 21 of the Road Traffic Act, 1930, should be served upon him. That section provides: " Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor-vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either— (*a*) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (*b*) within fourteen days of the commission of the offence a summons for the offence was served on him; or (*c*) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and

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the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence." By some mistake—rather a careless mistake, I suppose, but still a mistake—the police put in the notice 1.15 p.m. instead of 11.15 a.m. The notice said: "I hereby give you notice that it is intended to institute proceedings against you in respect of an offence under section 11 of the Road Traffic Act, 1930, the particulars being that, at or about 1.15 p.m. on Thursday the 4th day of December, 1952, whilst driving Austin motor-car Index No. KGH 521 on the road leading from Brook Street, Brentwood to Ingrave at Mascalls Lane, Great Warley, at the junction with Warley Hill, you did drive the said motor-car in a manner which was dangerous to the public, having regard to all the circumstances of the case."

As I said in VENN *v.* MORGAN [1949] 2 All E.R. 562 at p. 563, "In considering whether a notice purported to be given under section 21 is sufficient we ought to use a modicum of common sense." Oliver J., in giving judgment in that case, pointed out (at p. 564) that these notices are not formal documents like informations or indictments, and that we have to consider what is the object of the legislature. The object of the legislature is to call the proposed defendant's attention to the fact that he is going to be prosecuted so that he may know while the facts are still in his mind. Oliver J. said: "The object of the notice is to call the attention of the driver of the motor-car to the time and circumstances in respect of which he may be charged so as to give him, as my Lord has said, an opportunity, in good time while memories are still fresh, to prepare his defence." The defendant did not give evidence in this case. If such a state of affairs arose as Mr. Jellinek has suggested might arise, and the defendant had gone into the box and said: "I was in that particular road twice that day, once about 11.15 a.m. and the other time about 1.15 p.m.," it is possible that different considerations might apply. If he had had two accidents, of course different considerations

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would apply; but, in my opinion, the principle we have to bear in mind here is that there is a distinction between the construction to be placed on a statute which is mandatory and that which applies where the provisions of the statute are merely directory. In that connection I may quote a passage from the tenth edition of *Maxwell on Statutes*, p. 376: "It has been said that no rule can be laid down for determining whether the command"—that is the command of the statute—"is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice,"—for which proposition there is cited Lush J. in R. *v.* INGALL (1876) 2 Q.B.D. 208—"and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

In WOODWARD *v.* SARSON (1875) L.R. 10 C.P. 733 Lord Coleridge, giving the judgment of the court, said (at p. 746): "The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially." That case was concerned with the marking of ballot papers by a presiding officer for an illiterate defendant. The following of the rules contained in Sched. I to the Ballot Act, 1872, with regard to the way in which the marking was to be done was held to be directory. The object of the Act was secrecy, and disregard of

the rules with regard to the way in which the marking was done would not invalidate the vote, provided that the object of the Act was obtained, that is to say, that the marking was to be done secretly. Here, the object of the Act, as Oliver J. said in the passage I have read, is to bring to the defendant's mind when the events are still fresh in his memory the fact that he is going to be prosecuted. He could have been under no conceivable doubt for what offence he was to be prosecuted. He was told the exact place where he was alleged to have committed the offence, and that is the place where the accident happened. Therefore, it is idle to say that his mind was not at once directed to the actual occurrence in respect of which he was going to be prosecuted. Supposing the notice had said 11.30 p.m. and it happened at 11.15 p.m., or supposing it said 11 a.m. instead of 11.15 a.m., could anybody suppose that the notice would be bad under those circumstances?

In my opinion, we should apply the passage I have quoted from WOODWARD *v.* SARSONS (*supra*) and hold that the mandatory part of section 21 (*c*) is the service of a notice that the defendant is going to be prosecuted and stating the offence in respect of which he is going to be prosecuted—in this case dangerous driving at the place named. The mere fact that the actual hour is incorrectly stated in these circumstances, in my opinion, makes no difference. If ever there should be such a curious case as that of a man meeting with two accidents on the same day at or about the same place, possibly other considerations might apply, because then the defendant might say that he was misled. In this case, the defendant on whom is the onus of showing that he was misled, gave no evidence. The fact emerged as soon as the police officer gave evidence that the accident took place at 11.15. In my opinion, this was a point on which the justices came to a wrong decision, though I can well understand their doing so with a skilful advocate before them, if they looked only at the words of the statute, and had not the advantage of Maxwell or any of the cases which I have cited before them. This case must go back to

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them with an expression of opinion from this court that the notice was good and that they must proceed to hear the case.

PARKER J.: I agree.

DONOVAN J.: I also agree.

Case remitted.

Solicitors: Sharpe, Pritchard & Co., agents for Arthur Morgan, Chelmsford, for the appellant; Patersons, Snow & Co., agents for Gepp & Sons, Chelmsford, for the respondent.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PARKER AND MR. JUSTICE DONOVAN

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Re WILLIAM OSWALD FEATHERSTONE

Habeas Corpus—Prisoner Serving Sentence—Preventive Detention—Sentence Passed before April 18, 1949—*Transitional Provisions—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *Sched. VIII*, *para.* 3 (3).

The court does not grant a writ of *habeas corpus* to a person serving a sentence passed by a court of competent jurisdiction, and probably the only case where the court would grant such a writ would be if the court were satisfied that the person sentenced was being kept in custody after the term of his sentence had expired.

Writ refused in the case of a prisoner sentenced to preventive detention prior to the coming into force of the Criminal Justice Act, 1948, the transitional provisions contained in para. 3 (3) of the Eighth Schedule to the Act being specifically applicable to such a case.

Application for order of *habeas corpus*.

The applicant, William Oswald Featherstone, was convicted at the Central Criminal Court on June 28, 1947, of housebreaking and of being a habitual criminal, and was sentenced

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to five years' penal servitude and five years' preventive detention. His appeal against conviction and sentence was dismissed by the court—the Lord Chief Justice, Humphreys and Singleton JJ.—on October 22, 1947. In December, 1952, the applicant obtained from the Secretary of State permission to make an application for *habeas corpus*. In his affidavit the applicant complained that his sentence of preventive detention was passed under the Prevention of Crimes Act, 1908 (rep.) and should be served under the conditions provided for by that Act; that as penal servitude was abolished on the day when the Criminal Justice Act, 1948, came into force (April 18, 1949), his sentence of preventive detention started on that date and that he ought not to be penalised by the more severe conditions with regard to remission which apply to sentences of preventive detention passed under the Act of 1948.

No counsel appeared.

THE LORD CHIEF JUSTICE: The applicant apparently seeks a writ of *habeas corpus* on the ground that, as penal servitude was abolished when the relevant portion of the Criminal Justice Act, 1948, came into force on April 18, 1949, his sentence of preventive detention started on that date and he ought not to be penalised by the more severe conditions with regard to remission that apply to sentences of preventive detention passed under the Act of 1948.

The court does not grant, and cannot grant, writs of *habeas corpus* to persons who are in execution, that is to say, persons who are serving sentences passed by courts of competent jurisdiction. Probably the only case in which the court would grant *habeas corpus* would be if it were satisfied that the prisoner was being held after the terms of the sentence passed on him had expired.

The applicant has some idea of the effect of the Criminal Justice Act, 1948, but he is evidently unaware of the Eighth Schedule. The present application is dealt with entirely by the transitional provisions of that Schedule. Para. 3 (3) of the Schedule provides: "Where a person has been sentenced to

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penal servitude for a term which has not expired at the commencement of this Act, and is liable to undergo a period of preventive detention on the determination of the sentence of penal servitude, there shall be substituted for the sentence of preventive detention a sentence of preventive detention under this Act for a like period; and the provisions of this Act relating to preventive detention shall apply to that person accordingly." The application, therefore, is refused.

Application refused.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PARKER AND MR. JUSTICE DONOVAN

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Indictment—Quashing—Evidence on Depositions in Opinion of Court Insufficient for Conviction—Mandamus.

A court is not entitled to quash an indictment on the ground that the evidence as disclosed in the depositions does not appear to it sufficient to justify a conviction on any count.

Where a court of quarter sessions has quashed an indictment on that ground, mandamus will lie directing the court to try the indictment.

Motion for order of mandamus.

Informations for offences under article 1 of the Iron and Steel Prices Order 1951, and regulation 55AB of the Defence (General) Regulations, 1939, were preferred against a number of defendants, individuals and companies, by the applicant, Alec Downes, a higher executive officer of the Ministry of Supply, and the defendants were committed for trial to the

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County of London Sessions, where indictments containing counts corresponding to the informations were preferred against them. Before arraignment, counsel for the defendants moved to quash the indictments on the ground that the evidence for the prosecution as disclosed by the depositions was insufficient to justify a conviction on any count, and the Chairman, relying on DEFIANT CYCLE CO. *v.* NEWELL [1953] 1 All E.R. 38, quashed the indictments on that ground. The applicant obtained leave to apply for an order of certiorari quashing the order of quarter sessions and for an order of mandamus directing quarter sessions to hear and determine the indictments.

The Solicitor-General (*Sir Reginald Manningham-Buller, Q.C.*), *J. P. Ashworth* and *Edward Clarke* for the applicant.

R. F. Levy, Q.C., and *Neville Faulks* for the first defendants.

Sebag Shaw for the second defendants.

F. H. Lawton for the third defendants.

Henry S. Ruttle for the fourth defendants.

Victor Durand for the fifth defendants.

July 24. The judgment of the court was read by—

THE LORD CHIEF JUSTICE: In these cases the Solicitor-General moves for orders of certiorari and mandamus directed to the London Sessions to bring up and quash an order whereby the court purported to quash indictments preferred against the several individuals and companies named therein, and commanding the sessions to hear and determine the indictments according to law.

When the indictments came before the sessions, counsel for the accused moved before arraignment to quash them, not on the ground that they did not disclose offences known to the law or that the counts were in any way defective, but on the ground, apparently, that, if the depositions were examined, it would be found that the evidence for the prosecution was insufficient to support a conviction. Having examined the

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depositions, the learned Chairman announced that the indictments would be quashed on the ground that, having regard to the decision of this court in DEFIANT CYCLE CO. *v.* NEWELL [1953] 1 All E.R. 38, the prosecution would not be able to obtain a conviction. There was, he thought, insufficient evidence to show that the statutory instruments (the breach of which formed the substance of the indictments) had been duly published or brought to the knowledge of the defendants.

The questions that arise are (1) whether the court had any power to act in this manner, and (2) if not, what steps, if any, this court can take to compel the sessions to try the case.

No member of this court has ever known or heard of a court quashing an indictment in such circumstances, nor can authority be found to support it. It is said, however, that a court must have power at common law to quash an indictment if satisfied, from a perusal of the depositions, that there must be an acquittal in the end. This seems to ignore entirely the method by which an indictment comes before a court of trial. At common law any person could prefer an indictment to the grand jury and seek a presentment on the information he could give by himself or by witnesses. It was unnecessary to have any depositions at all. Depositions as at present understood are entirely the creation of the Indictable Offences Act, 1848 (rep.), though before that Act no doubt justices took statements from witnesses in the absence of the accused and also examined him and returned the examinations to the court of trial. A grand jury acted on any evidence they saw fit to admit and could, and constantly did, act on their own knowledge. The sonorous and stately oath administered to the foreman of the grand jury (which unfortunately is no longer heard after the opening of the commission at the assizes) required the grand jurors "diligently to enquire and true presentment make" of all such offences, matters and things which were given them in charge or might otherwise come to their knowledge. If anyone takes the trouble to read the old Sessions Papers published by various individuals from time to time (and very good reading they are), he will find that they are full of cases

down to the reign of Queen Victoria presenting all manner of things to the court, which in those days was really the source of local government for the county relating to such matters as roads, which they knew to be out of repair, bridges that were in danger, public nuisances, disorderly houses, gaming houses and the like, all out of their own knowledge. Once a presentment was made, so that the bill became an indictment, the court had to try it unless the alleged offence was unknown to the law or was imperfectly set out, so that it would have been bad on error or unless matter in bar was alleged by plea, in which case the plea in bar had, and still has, to be tried. Objection to the matter or form of the indictment could be taken by motion to quash, or less usually by demurrer. The only question then was whether the indictment was good in substance and form, and not whether the evidence which had been before the grand jury would support it. Indeed, the grand jury's oath obliged them to keep all their proceedings secret: "The King's counsel, your own and your fellows' you shall observe and keep secret." As, however, the liberty of any individual to present a bill was liable to abuse, the Vexatious Indictments Act, 1859 (rep.), limited the right of the private prosecutor to prefer a bill for certain specified alleged offences.

When the grand jury was abolished in 1933, committal for trial was substituted for presentment, although provision is made in the Act for enabling any person to prefer a bill by leave of the judge. The signing of the bill by the proper officer of the court is equivalent to presentment, and if the accused has been formally committed for trial the officer must sign it, though if he is in doubt whether the committal was regular the matter must be decided by the presiding judge. If he decides it is irregular, no doubt his ruling would have the same effect as the ignoring of a bill by the grand jury. Once an indictment is before the court, the accused must be arraigned and tried thereon unless (a) on motion to quash or demurrer pleaded it is held defective in substance or form and not amended; (b) matter in bar is pleaded and the plea is tried or

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confirmed in favour of the accused; (c) a *nolle prosequi* is entered by the Attorney-General, which cannot be done before the indictment is found; or (d) if the indictment discloses an offence which a particular court has no jurisdiction to try, for example, an indictment at sessions for an offence punishable with imprisonment for life in the first instance not triable at sessions, in which case the indictment is sent to the assizes.

I know of no power in the court to quash because it is anticipated that the evidence will not support the charge. The only ground on which the court can examine the depositions before arraignment is to see whether, if a count is included for which there has not been a committal, the depositions or examination taken before a justice in the presence of the accused disclose that offence.

Accordingly, the course taken by the sessions in this case was not warranted by law; it amounts to saying that the court has satisfied itself, not on evidence given before the court but on depositions taken elsewhere, that the accused has a defence. Moreover, if this course were permissible, it would enable a court, the members of which disapproved of or disliked a statute the breach of which formed the subject of the indictment, simply to quash it and decline to try it.

It is, of course, well known to every practitioner that, if the prosecution is satisfied that there is a good defence to the charge, or that for some reason it is inadvisable to proceed, it is permissible, with the leave of the court after issue joined, to offer no evidence, when a verdict of acquittal will be directed. Again, if there is more than one indictment against a prisoner, it is quite common practice, after the trial of one of them, to direct that the other or others are to remain on the file and not to be prosecuted without leave.

I would also add that it often happens (and, indeed, we were told it was so in this case) that the prosecution intend to call evidence in addition to that given before the court of committal. This they are entitled to do, and though modern practice requires, at least, if it involves the calling of additional

witnesses, that notice of the fresh evidence should be given, there is no statutory requirement to this effect.

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The question then arises what, if anything, this court can do to correct the error into which the sessions have fallen. I feel no doubt that an order of mandamus to hear and determine the indictment can issue. The sessions, in effect, have refused to try the case. No one suggests that the indictment does not disclose an offence, or that it is not good in form, or that the sessions had no jurisdiction to try it. They cannot quash because they are of opinion that the accused have a defence. They must try the case.

This court has on several occasions sent an order of mandamus to sessions where they have declined to proceed. A recent instance is R. *v.* OXFORD JUSTICES (1953) (unrep.) where the sessions held that they had no power to try a charge of dangerous driving on indictment as the defendant had not elected to go for trial, and in the case of THE KING *v.* NORFOLK QUARTER SESSIONS, *ex p.* BRUNSON (*ante*, p. 6), where the court declined to proceed because some inadmissible evidence had been given before the committing justices. In both those cases the court by order of mandamus directed the sessions to hear and determine.

With regard to certiorari, the question is by no means so clear, and I may refer to a recent learned note by Mr. D. M. Gordon in the April number of the *Law Quarterly Review*, Vol. 69, p. 175. It seems that when sessions are sitting as a court of oyer and terminer to try prisoners on indictment, certiorari will not lie to bring up a judgment either of acquittal or conviction. The quashing of an indictment is not a judgment of acquittal, nor *a fortiori* of conviction. It is true that in the NORFOLK QUARTER SESSIONS CASE (*supra*), where this point was not taken, this court did order certiorari to issue both for the order quashing the indictment and for the order as to costs. It may be that, had this point been taken, the court would have confined the certiorari to the order for costs. But, in truth, I do not think any certiorari is necessary, so that we need not consider the cases and learning on this subject. The

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court by its order of mandamus will direct the sessions to try the indictment, so it would be eminently futile to take the objection that they have made an order quashing it. It is just because they have made that order that the court directs them to try the case, thus, in effect, directing them to ignore the order they have made.

The order of mandamus will go, and the defendants will pay the costs of the application.

PARKER J.: I entirely agree.

DONOVAN J.: I agree.

Order of mandamus.

Solicitors: Treasury Solicitor, for the applicant; Capel Cure, Glynn Barton & Co., for the first defendants; Lewis Lloyd & Co., for the second defendant; Wontner & Sons, for the third defendants; Mellows & Mellows, for the fourth defendants; Hart-Leverton & Co., for the fifth defendant.

BEFORE

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ROBERT NORMAN HAWES
RALPH STANISLAW ANDREW DEAN
VERNON EGERTON ROLAND BLUNT
CLIFFORD MALCOLM WAIGHT
GERALD EDGAR WAIGHT
DISPOSALS, LTD.
DEAN DEVITT GILBERT & CO., LTD.

Conspiracy—Public Mischief—Conspiracy to Contravene Provisions of Statute—Conspiracy to Obtain and Sell in England Pottery Forbidden to be Supplied Except for Export—Domestic Pottery (Manufacture and Supply) Order, 1947 (*S.R. & O.* 1947, *No.* 373), *arts.* 1, 2, 5 (*as amended by S.I.* 1948, *No.* 1616).

Trial—Summing-up—Long and Complicated Case—Case of Each of Several Defendants Dealt with Separately—Separate Verdict Taken After Each Individual Case Dealt with—No Separation of Jury During Consideration of any Individual Verdict.

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The appellants were convicted of conspiracy to effect a public mischief, the particulars of offence alleging that they had conspired together by fraudulent means to obtain and by dishonest devices to distribute to the home market decorated domestic pottery, contrary to the Domestic Pottery (Manufacture and Supply) Order, 1947, which forbade manufacturers to supply such pottery except for export. The appellants obtained the pottery from registered exporters or manufacturers by false representations that it was intended for export. The goods then went to one of three companies controlled by one or other of the appellants and were sold to retailers under false documents describing them as frustrated or rejected exports. The Order of 1947 did not specifically refer to the obtaining of decorated domestic pottery by such means and the subsequent sale of it in the home market, nor did it prescribe a penalty for making a false declaration.

Held, that the particulars of offence sufficiently alleged a common law misdemeanour whether it was regarded simply as a conspiracy to effect an unlawful purpose, or a conspiracy by dishonest devices to defeat the clear intention and purpose of a statute, or a conspiracy to work to the prejudice of the State, and the convictions were, therefore, proper.

Per curiam : The right approach to cases of public mischief is to regard them as part of the law of conspiracy, and to hold the actions of an individual not committed in commission with others as indictable only if they constitute what has been held in the past to be a common law or statutory offence.

Dictum of Souldon Lawrence J. in HIGGINS (1801) 2 East 5, and MANLEY, 24 Cr.App.R. 25; [1933] 1 K.B. 529, criticised.

In summing up the judge first gave a general outline of the case as a whole and then dealt with the case of each prisoner separately. After the case of each prisoner had been dealt with, the jury retired to consider their verdict against that prisoner, and returned a separate verdict with regard to him. The judge then dealt with the case of the next prisoner and the same procedure was followed. At no time did the jury separate during their consideration of any individual verdict.

Held that, having regard to the length and complexity of the case, the procedure adopted by the judge with regard to the summing-up was a proper one.

NEAL, 33 Cr.App.R. 189; [1949] 2 K.B. 590, distinguished.

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Appeals against conviction.

The appellants were convicted at the Central Criminal Court on April 2, 1953, of conspiracy to effect a public mischief and were sentenced by Glyn-Jones J., Newland to eighteen months' imprisonment; Hawes, Dean and Blunt each to two years' imprisonment; Clifford Waight to five years' imprisonment; Gerald Waight to twenty-one months' imprisonment; and Disposals, Ltd. and Dean Devitt Gilbert & Co., Ltd. each to pay £2,000 towards the costs of the prosecution.

The particulars of offence in the first count alleged that all the appellants between May 1, 1947, and July 15, 1948, conspired together and with certain persons not before the court by fraudulent means to obtain and by dishonest devices to distribute to the home market for eventual retail sale within the United Kingdom decorated domestic pottery which was not available for such supply, whereby the pottery was not available for sale for currency other than that of the United Kingdom. The particulars of offence in the second count referred to a similar conspiracy at a later date. The goods in question came either from registered exporters, or from manufacturers (mainly from the former). A registered exporter who had obtained domestic pottery was not obliged himself to export, but might sell to anyone who gave the appropriate declaration that he intended to export the goods. The appellants either gave or were party to the giving of false declarations, and in addition gave or were party to giving their suppliers false shipping marks and in some cases false names of vessels on which the goods were purported to be shipped, or took some part in the disposal on the home market of goods thus obtained. The goods went to three companies which were registered, but which were parties to the fraud, Dean Devitt Gilbert & Co., Ltd., Disposals, Ltd., and Wilfred Hawes & Co., Ltd., a company with which the appellant Hawes was associated. The goods were taken or were already at a wharf and were there distributed to firms controlled by the appellant Clifford Waight, and sales to retailers were effected by means of bogus documents and invoices falsely

describing the goods as frustrated or rejected exports. The case for the prosecution was that by these means the appellants disposed of decorated domestic pottery to the value of £70,000.

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In summing up the case, Glyn-Jones J. first dealt with the cases as a whole, and then proceeded to deal with the case of each individual prisoner. The jury then retired, and returned a verdict in the case of that prisoner. The judge then adopted the same procedure with regard to the next prisoner, so that a series of separate verdicts was taken. At no time did the jury separate during their consideration of any individual verdict.

F. Ashe Lincoln, Q.C., and *Kenneth Richardson*, for the appellants Dean and Hawes:

The main question in this appeal is whether a charge of conspiracy to effect a public mischief can be maintained in law. The doctrine of public mischief is one that is very much restricted in law, though it was fairly recently extended by the courts in MANLEY, 24 Cr.App.R. 25; [1933] 1 K.B. 529. The offences which it embraces have always remained undefined, and there has been a generally accepted principle that if it is possible to charge a conspiracy at common law that should be charged in preference to a conspiracy to effect public mischief. In any event, the facts of the present case did not warrant the latter charge. Glyn-Jones J. took judicial notice of the fact that it was a matter of the public policy of the Government that foreign currency should be obtained for the good of the country. That, it is submitted, was a question of politics, not of law. The function of the judge on a charge of public mischief does not appear to be clearly established. If the function of the judge is to rule that certain acts constitute a public mischief, in a case where the facts are not in dispute, there is no issue left for the jury to decide. It is submitted that the proper procedure is for the judge to rule whether the acts in question tend to effect a public mischief, and for the jury to decide whether the acts do in fact constitute a public

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mischief. The essential element of the offence is damage to the public. In the present case the public were not damaged, because the appellants provided them with decorated pottery at a time when it was needed and could not be obtained. [SELLERS J. If honest traders were restricted from supplying it, surely it was against public interest that a free field should be given to dishonest traders.] If a conspiracy was to be charged, it should have been a conspiracy at common law, such as conspiracy to defraud. If a conspiracy to evade a statute does not amount to a conspiracy at common law, it cannot be rendered indictable by framing it as a conspiracy to effect a public mischief. Not every scheme to evade a statute is criminal. A scheme for avoiding surtax or death duties may be lawful: INLAND REVENUE COMMISSIONERS *v.* DUKE OF WESTMINSTER [1936] A.C. 1, *per* Lord Tomlin at pp. 9 and 10.

The other point relied on by the appellants is that the manner of the division of the summing-up into separate portions and the taking of a series of separate verdicts was irregular. Once a jury had begun to consider their verdict, they should not be allowed to separate: NEAL, 33 Cr.App.R. 189; [1949] 2 K.B. 590. In the present case the charge was one of conspiracy, and a finding of conspiracy against one conspirator might well involve findings against another. The jury should not have been allowed to separate after returning individual verdicts. They should have been asked to return one verdict.

Kenneth Richardson, for the appellant Blunt.

The other appellants in person.

Eric Sachs, *Q.C.*, *Neville Faulks* and *D. C. H. Hirst*, for the Crown:

Charges of conspiracy relating to the same facts may be framed in more than one way. It is clearly a conspiracy to effect a public mischief, and may properly be charged as such, where the object of the conspirators undisputedly is to defeat the provisions and object of a statute. The evidence showed that the appellants were clearly trying to do something against

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the public interest, namely, to create a black market in domestic pottery.

At the conclusion of the arguments the Lord Chief Justice said that the appeals would be dismissed and that the court would give their reasons at a later date.

Cur adv. vult.

Oct. 19. The judgment of the court was read by

THE LORD CHIEF JUSTICE: The court has already dismissed these appeals and now proceeds to give its reasons. The appellants were all convicted before Glyn-Jones J. at the Central Criminal Court in April on an indictment containing thirteen counts, but a verdict was only taken on two of them. On the first count the statement of offence was "conspiracy to effect a public mischief" and the particulars were that all the appellants between May 1, 1947, and July 15, 1948, conspired together and with certain persons not before the court by fraudulent means to obtain and by dishonest devices to distribute to the home market, that is, for eventual retail sale within the United Kingdom, decorated domestic pottery which was not by reason of the Domestic Pottery (Manufacture and Supply) Order, 1947, or under any licence granted by the Board of Trade available for such supply, whereby the said pottery was not available for sale for currency other than that of the United Kingdom. The second count charged them with a similar conspiracy, the particulars referred to a later date and not only to the Order of 1947 but to an amending Order of 1948, but the amendments are not material to this appeal. Some of the appellants were convicted on both counts, others who were alleged to have entered the conspiracy at a later date only on count 2. Again for the purposes of this appeal this is immaterial and the cases of all the appellants stand on the same footing.

It would be convenient at the outset to refer to the Order mentioned in the indictment. The Domestic Pottery (Manufacture and Supply) Order, 1947, which is dated March 1 of that year, was made by the Board of Trade in pursuance of

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powers conferred by Regulation 55 of the Defence (General) Regulations, 1939, which was kept in force by virtue of the Supplies and Services (Transitional Powers) Act, 1945. Article 1 (1) provides that " No manufacturer shall manufacture any domestic pottery except under the authority of a licence issued by the Board of Trade under this paragraph and in accordance with any condition attached to that licence." By article 2 it is provided that " Except under the authority of a licence issued by the Board of Trade under this article and in accordance with any condition attached thereto, no manufacturer shall supply any domestic pottery manufactured by him other than undecorated domestic pottery of a description specified in the Second Schedule hereto." Article 5 provides that " (1) The Provisions of this Order except paragraph (1) of article 1 shall not apply to the manufacture or marking of domestic pottery of any description intended for supply, or to the supply of any such goods . . . (*b*) to the holder of an exporter's certificate issued for the purposes of this article by the Board of Trade, being a person who when placing his order for the goods endorsed it with the words ' for export.' (2) A person referred to in heading (*b*) of the preceding paragraph shall not supply any domestic pottery in respect of which his order was endorsed ' for export ' otherwise than by such exportation." The Order of 1948, made on July 13 of that year, amends the previous Order by providing that " any domestic pottery may be supplied without a licence to the holder of an exporter's certificate who surrenders a document, signed and dated by him, clearly indicating that he requires that pottery for export," and by providing that " a person so supplied may not supply that pottery except by export." The object of these Orders is clear enough and is designed to assist what was and is commonly known as the export drive. Decorated domestic pottery was a desirable and valuable export which could be sold in overseas markets and thus assist this country to obtain foreign exchange, and therefore it was desired to restrict or even prohibit the sale of this commodity on the home market so as to increase the amount

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available for export. No doubt this was a policy of the Government, but it was a policy authorised by Parliament as the Board of Trade were able to issue the Regulations by virtue of the statute referred to therein. Parliament must also be taken to have approved the Orders as no prayer was presented against them, and it has been recognised over and over again that Statutory Rules and Orders, if *intra vires* the Act under which they are made, have exactly the same effect as though they were contained in the enactment itself. There has never been any suggestion that these Orders were *ultra vires*. It is to be observed, and this is a matter of importance, that the Orders in terms deal only with manufacturers or persons holding export certificates from the Board of Trade and who were referred to in the trade as registered exporters. They may only supply decorated pottery for export. The Orders do not in terms deal with a person who obtains from a manufacturer or registered exporter these goods, representing that they are for export, and then, having obtained them, sells them on the domestic market. But it is obvious that, if persons who falsely represent that they intend to export the goods and thereby obtain supplies of them could then with impunity sell the goods in this country, the whole scheme would break down and the object of the legislature would be defeated. Moreover, such conduct on the part of traders who set to work dishonestly by false and deceptive documents and devices to obtain and deal with goods contrary to the clear intention of the Orders must work serious prejudice to the reputable members of the trade who are carrying on their business in accordance with the law. We may also say at once that it is no answer to the allegation that the appellants were acting fraudulently in this matter to say that the persons who supplied the goods in the circumstances which I shall mention in a moment were not defrauded merely because they were paid the full invoice price. It is enough to show that they would not have acted as they did but for the false representations and dishonesty of the persons who obtained the goods for them. This is so clear that we do not propose to enlarge upon it.

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Now the facts which were proved in this case are that the goods came either from registered exporters or from manufacturers, though mainly from the former. A registered exporter who had obtained decorated pottery was not obliged himself to export but might sell to anyone who gave him an appropriate declaration that he intended to export the goods, but no penalty is prescribed for the giving of a false declaration. These appellants were proved either to have given or to have been party to false declarations that the goods were wanted for export, and in addition to that to have given or to have been party to giving their suppliers false shipping marks and in some cases false names of vessels on which the goods were purported to be shipped, or to have taken part in the disposal on the home market of the goods so dishonestly obtained from the manufacturers. In fact these goods went to three firms or companies who were registered, but were proved to have been parties to the fraud. These companies were Dean Devitt Gilbert & Co., Ltd., who were charged on both counts as conspirators, Disposals, Ltd., who were charged in the second count only, and Wilfred Hawes & Co., Ltd., a company with which the appellant Robert Norman Hawes was connected or which he controlled. The goods were, in fact, taken to or were already at a wharf and then were distributed to firms controlled by the appellant Clifford Malcolm Waight and sales to retailers were effected by means of bogus documents and invoices falsely describing the goods as rejected or frustrated exports. It was the case for the prosecution that by these means the appellants were enabled to dispose of decorated pottery to the value of no less than £70,000, the result of which, of course, was that the total of this commodity available for export was decreased by that amount.

Two main grounds of appeal were taken on behalf of the appellants before us: (1) that the charge of conspiracy to effect a public mischief was a crime not known to the law and, as an alternative, that at least the particulars of the offence did not support a charge known to the law. We will deal with this point before considering the second ground which related to a

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matter of procedure only. It is much too late to object that a conspiracy to effect a public mischief is an offence unknown to the law. There have been at least three reported cases during the present century in which that charge has been made and convictions upheld. We refer to BRAILSFORD [1905] 2 K.B. 730; PORTER, 3 Cr.App.R. 237; [1910] 1 K.B. 369, and BASSEY (1931) 22 Cr.App.R. 160. There is also the case of MANLEY, 24 Cr.App.R. 25; [1933] 1 K.B. 529, in which there was a charge of effecting a public mischief but no charge of conspiracy and we propose to consider that case entirely separately. The court is well aware of the caution with which they should approach the consideration of an offence which is alleged to consist of doing acts which tend to effect public mischief as, if extended, it might enable judges to declare new offences which should be the business of the legislature. The objections to such a course were forcibly pointed out by Sir Fitzjames Stephen, the most prominent institutional writer on the criminal law in the last century, in his *History of the Criminal Law*, Vol. 3, p. 359.

We think we may say that the court should approach the subject at least with the same degree of caution as must be exercised when considering a plea in a civil action that something has been done contrary to public policy. Indeed nowadays we know that matters which are to be regarded as contrary to public policy, so, for instance, as to invalidate a contract, must be found in cases decided in the past and no additions are now to be made. No one has ever attempted to define what may or may not constitute a public mischief and we have certainly no desire to increase the number of criminal offences by adding to the category of misdemeanours. But there are two points which, in our opinion, do not make it necessary for us to consider whether there is here any attempt to create a new offence.

In the first place, it is well known that there may be many acts which, if done by an individual would not be indictable, or even actionable as a tort, and yet may become both actionable and criminal if done by a combination of persons as the result

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of a conspiracy, and for this really elementary proposition we need only refer to QUINN *v.* LEATHEM [1901] A.C. 495. Many other illustrations are to be found both in the old and in the more modern reports, for instance, VERTUE *v.* CLIVE (LORD) (1769) 4 Burr. 2472; CLIFFORD *v.* BRANDON (1809) 2 Camp. 358; the note to LEIGH (1775) 1 C. & K. 28n.; MOGUL STEAMSHIP CO., LTD. *v.* MCGREGOR, GOW & CO., LTD. (1889) 23 Q.B.D. 598; and SOUTH WALES MINERS FEDERATION *v.* GLAMORGAN COAL CO. [1905] A.C. 239. A conspiracy consists of agreeing or acting in concert to achieve an unlawful act or to do a lawful act by unlawful means. Can anyone doubt that if persons conspire to obtain a commodity for sale in this country by false representations and fraudulent documents when legislative enactments provide that except under licence it is only to be sold for export they are not using unlawful means to effect the end in view?

Secondly, in Hawkins' *Pleas of the Crown*, Vol. 1, p. 446, a work of great authority, it is stated: "There can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person are highly criminal at common law, as where divers persons confederate together by indirect means to impoverish a third person." This passage was quoted in the judgment of Fry L.J. in MOGUL STEAMSHIP CO., LTD. *v.* MCGREGOR, GOW & CO., LTD. (*supra*, at p. 630) and that judgment is very much in point in this case. He was dealing with indictable conspiracies and refers to STERLING AND OTHERS (1663) 1 Lev. 126. He quotes (at p. 631) the explanation of that case given by Holt C.J. in DANIELL (1704) 6 Mod.Rep. 99, that "the real ground of the decision was that the offence of the defendants," that is the conspiracy, "was of a public nature and levelled at the Government" and that is exactly the case here. The third person injured and impoverished here is the State or as Holt C.J. called it, the Government.

The statement of offence in both these counts might have consisted simply of conspiracy to commit a common law misdemeanour and the particulars thereunder plainly show the constituents. In upholding these convictions, therefore, we

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are in no way creating a new offence. The particulars sufficiently allege a common law misdemeanour, namely conspiracy, and whether the matter is looked at simply as a conspiracy to effect an unlawful purpose or a conspiracy by dishonest devices to defeat the clear intention and purpose of an Act of Parliament or to work to the prejudice of the State, in our opinion, they disclose offences which have long been known to the common law of this country. Mr. Ashe Lincoln tried to compare this case to one in which persons devised plans for avoiding surtax or death duties, and quoted Lord Tomlin's well-known dictum in INLAND REVENUE COMMISSIONERS *v.* DUKE OF WESTMINSTER [1936] A.C. 1 at pp. 19 and 20. But the cases are in no sense analogous. What the noble and learned Lord laid down was that, if a man can order his affairs so that the tax attaching under the particular Acts was less than it otherwise would be, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers might be of his ingenuity, he cannot be compelled to pay the increased tax. But in that case the taxpayer had done nothing dishonest, nothing false, nothing deceptive. The only question in the case was as to the legal effect of certain admittedly genuine deeds; they were held to create an obligation to pay annuities, not salary or wages and consequently the taxpayer was entitled to deduct the payments in arriving at the total income for surtax purposes. Openly and without fraud of any kind he had become entitled to certain deductions from his income.

We cannot leave this part of the case without referring to MANLEY (*supra*), a case binding on this court, though it has been subject to considerable criticism. The facts were that the defendant, a woman, had given false information to the police that she had been assaulted and robbed, thereby causing officers of the police to waste their time investigating a bogus crime and exposing individuals answering to the description of the pretended robber to suspicion. In upholding the conviction this court held that such conduct amounted to a misdemeanour,

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namely effecting a public mischief. They were relying on a dictum of Souldon Lawrence J. in HIGGINS (1801) 2 East 5, as well as on the cases of BRAILSFORD and PORTER (*supra*). The dictum in HIGGINS (*supra*) was that all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the public are indictable, but no other member of the court stated the law in such wide terms. It is the breadth of that dictum that was so strongly criticised by Sir Fitzjames Stephen in the passage in his *History of the Criminal Law*, to which we have already referred, and also by Dr. Stalybrass in 34 L.Q.R. 183. In effect, it would leave it to the judges to declare new crimes and enable them to hold anything which they considered prejudicial to the community to be a misdemeanour. However beneficial that might have been in days when Parliament met seldom, or at least only at long intervals, it surely is now the province of the legislature and not of the judiciary to create new criminal offences. The Council, or as it was more generally termed the Court of Star Chamber, in its time rendered considerable service to the criminal law by declaring some matters, notably perjury, to be misdemeanours though they never attempted to create new felonies. But conditions now are wholly different. The actual decision in HIGGINS (*supra*) was that an incitement to commit a felony was a misdemeanour. The court showed that it was firmly established by decisions that an attempt to commit a misdemeanour was in itself a misdemeanour and applied that doctrine to attempts to commit felony and held that the solicitation was in itself an act sufficient to prevent the application of the doctrine that mere intention unaccompanied by some act would not support an indictment for an attempt. No one would criticise the actual decision, but the very wide dictum to which we have referred is unnecessary to support it. The short judgment in MANLEY (*supra*), while referring to BRAILSFORD (*supra*) and PORTER (*supra*), apparently overlooked or, at any rate, makes no mention of what, in our opinion, was an all important factor in those cases, namely that in both there

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was a charge of conspiracy. With all respect to a case which, as we have said, is binding upon us, we believe that the right approach to what may be compendiously called public mischief cases is to regard them as part of the law of conspiracy, and to hold the actions of an individual not committed in combination with others as indictable only if they constitute what has been held in the past to be common law or statutory offences. It may be that MANLEY'S CASE (*supra*) will some day be considered by the House of Lords and in any case we venture to think that it would be a useful reform if such conduct as was there disclosed were made a summary offence by the legislature. We need not further enlarge upon it, as the charge we are now considering was one of conspiracy, except to say that in our considered opinion the safe course is no longer to follow it.

We now pass to the second ground of appeal. What is challenged is the action which the learned judge took in summing up the case. He started his summing-up, with all the defendants in the dock, by giving the jury a general outline of the case and a charge on the law and no fault is found with his direction. He then proceeded to deal with the case of each defendant separately and took separate verdicts thereon. For instance, he first dealt with the case of Clifford Waight and, having summed up the evidence with regard to that defendant, he sent the jury out to consider their verdict against him. When the jury returned with a verdict of Guilty, that defendant was sent down and the judge started to sum up the evidence against the second defendant, again taking a separate verdict, and so on against all of them. His summing-up occupied altogether three days and at the conclusion of each day the jury were allowed to separate and to come back the following morning. They in no case separated while they were considering a verdict. We can see no objection in law to the course which the learned judge took. It was no doubt unusual, but so also was the case. It had taken the better part of six weeks to try, a mass of documents had to be

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considered and the case was one of great complexity. To have thrown, so to speak, the whole of the case at the jury, leaving them to sort out afterwards the evidence against each defendant would have been neither in the interests of the defendants themselves nor in the interests of justice. It was part of the learned judge's duty to remind the jury that they would have to consider the case of each man separately. It would have been impossible for the jury to have done so with a case of this description except by the course which the learned judge took. It was objected that this offended against the decision in NEAL, 33 Cr.App.R. 189; [1949] 2 K.B. 590, but in our opinion that case has no application to what happened here. In NEAL'S CASE the recorder, having concluded his summing-up and enclosed the jury in charge of the bailiff, allowed them to separate and go out into the town for refreshment. The court felt obliged to hold that that was so contrary to established practice that the conviction could not be allowed to stand, applying the words of Lord Sumner in CRANE *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 15 Cr.App.R. 183 at p. 216; [1921] 2 A.C. 299 at p. 331, that " to deprive an accused person of the protection given by essential steps in criminal procedure " leaves the court no option but to quash the conviction. But what was done here amounted to no more than this: when the judge had summed up against the first defendant and taken the verdict the case was still part heard against all the other defendants and so it remained against each defendant until a verdict had been taken against him. It is well known nowadays that judges very often break off their summing-up to enable the jury to obtain refreshment or, if it has become late, to let them go home and consider the verdict fresh next morning, though it may be that very little remains to finish the summing-up. Once the summing-up is finished and the jury enclosed, they must not be allowed to separate, but we can see no reason why the jury should not be allowed to depart at night, though the summing-up is concluded and a verdict taken against one, while the case still remains part heard against the others. In our opinion there is nothing in this objection.

We cannot forbear from expressing our appreciation of the way in which Glyn-Jones J. dealt with a case of extraordinary length and complexity.

Appeals dismissed.

Solicitors: Randolph & Dean, for the appellants Dean and Hawes; Freeborough & Co., for the appellant Blunt; The Solicitor, Board of Trade, for the Crown.

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NEWLAND, HAWES, DEAN, BLUNT. CLIFFORD WAIGHT, GERALD WAIGHT, DISPOSALS LTD., DEAN DEVITT GILBERT & CO. LTD.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SELLERS AND MR. JUSTICE HAVERS

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DAVID JAMES THOMAS

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Larceny—Animals—Straying Sheep—Right to Distrain for Damage Feasant—Subsequent Further Straying with Defendant's Own Sheep—All Animals Driven Back to Defendant's Land—Time of Asportation—Larceny Act, 1916 (*6 & 7 Geo.* 5, *c.* 50), *s.* 1 (1).

Three sheep, the property of L, strayed on to the appellant's land and the appellant allowed them to remain there for some time. They then strayed again, together with nine belonging to the appellant, on to the land of M. The appellant drove all twelve sheep back on to his land, and kept the three which did not belong to him. He at no time claimed that he was retaining them for distress damage feasant or that he was reimpounding them. The judge directed the jury that the original finding of the sheep by the appellant and the failure by him to return them could amount to larceny, and the jury convicted.

Held, that the original finding of the sheep by the appellant could not amount to larceny, as there had been no asportation at that time by the appellant and, in any event, the appellant had a right to retain them for distress damage feasant; that the felonious asportation, if any, was when the appellant drove the sheep back from M's land on to his own, and that, as the jury had not been directed on this aspect of the case, the conviction must be quashed.

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Appeal against conviction.

The appellant was convicted at Pembrokeshire Assizes on June 25, 1953, of sheepstealing, and was sentenced by Stable J. to nine months' imprisonment.

Three sheep, the property of a neighbouring farmer named Lawrence, strayed on to the appellant's land, and the appellant allowed them to remain there for some time. They then strayed again, together with nine sheep belonging to the appellant, on to the land of an adjoining farmer named Marr, and the appellant drove all twelve sheep back on to his own land, and kept the three which did not belong to him. He at no time claimed that he was retaining them for distress damage feasant or that he was reimpounding them. Throughout his summing-up the judge directed the jury that the original finding of the sheep by the appellant on his own land and his failure to return them could amount to larceny, and did not direct them that, if they were to convict, they must be satisfied that the driving off from Marr's land on to the appellant's own land amounted to a felonious taking away.

Norman Richards, for the appellant:

There cannot on a charge of larceny be any qualified intent; if a person intends to keep property provided that the owner does not come along to claim it and is prepared to give it up if the owner does come to claim it, there is no felonious intent. It was open to the jury to draw the inference that that was the appellant's true state of mind, and they should have been directed on the law with regard to it. Further, the prosecution called evidence on the improbability of sheep straying over the distance between Lawrence's land and the appellant's land. That might have supported a charge of actually stealing the sheep from the field where they originally were, but it could have no bearing on the charge which was presented by the prosecution at assizes of stealing by finding after the sheep had arrived on the appellant's land, and was purely prejudicial. The summing-up directed the jury that the offence was committed if there was a taking for the purpose of the statute and that the

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stealing by finding was substantiated by the appellant's failure to return the sheep, and did not point out to them that there must be a " taking away." The only possible asportation was in the driving back of the sheep, after they had again strayed, from Marr's land to the appellant's own land, and there could be no asportation even then if the stray sheep happened to go along with the appellant's own sheep, as may, on the evidence, have been the case. This aspect of the matter was never put before the jury, nor were they told that the appellant in any case had a right to distrain for distress damage feasant.

Victor Durand, for the Crown :

It is conceded that the original finding of the sheep by the appellant could not amount to larceny and that the direction of Stable J. on this point was wrong. There was ample evidence of felonious asportation in the driving back of the sheep by the appellant from Marr's land on to his own, but, again, it must be conceded that that issue was never specifically put before the jury. They appear, however, to have been satisfied that the appellant's conduct was fraudulent throughout.

THE LORD CHIEF JUSTICE : The appellant was convicted before Stable J. at the Pembrokeshire Assizes of stealing three sheep, the property of a neighbouring farmer named Lawrence.

The court feels obliged to quash this conviction not, I hasten to say, by reason of any merits on the part of the appellant who, as the jury evidently thought, was acting dishonestly throughout, but because the case was not really presented in the way it ought to or might have been presented with regard to the doctrine of stealing by finding.

The three sheep originally trespassed on to the appellant's land. The appellant, finding the sheep on his land, was entitled—and this ought to have been pointed out to the jury—to distrain them damage feasant because they had been feeding on his ground. The law with regard to distress for damage feasant is not nowadays considered satisfactory, and

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the Committee which recently sat and advised about the law relating to animals had much to say about it. If there is a distress of cattle damage feasant, the farmer can distrain them and keep them on his land, and in the old days he was not bound to put them into the pound, although if he did put them into the pound, since the Prevention of Cruelty to Animals Acts, he was bound to feed them, and the most he could recover was the cost of feeding them. When, therefore, these sheep trespassed on to the appellant's land, he was entitled to distrain them, that is to say, keep them till satisfaction was made to him for any damage they might have done. Probably he might have been amply compensated by half-a-crown, but that was his right, and one of the respects in which the law with regard to damage feasant is now imperfect is that there is no obligation on anybody distraining for damage feasant to publish it abroad. He can keep the animal until the owner comes and tenders amends for what the animal has done.

The sheep having strayed on to the appellant's land, he kept them, and very likely kept them because he thought his luck would hold and nobody would ever claim them, although one cannot sell distrained sheep. They strayed again, with the appellant's own sheep, on to the land of a farmer named Marr whose land marched with his. The appellant went after them—perhaps because Mr. Marr complained—or went after his own sheep and drove back on to his own land all the sheep that had strayed. I cannot agree with Mr. Richards that when a farmer has nine sheep and finds twelve, and three of them are different, he cannot separate them. Having driven them all on to his own land, he kept the three which did not belong to him and which he knew did not belong to him. He was not reimpounding those sheep; that was not his case. But the only possible asportation which was necessary to sustain a charge of larceny was the taking back of the sheep by the appellant from Marr's land on to his own land, because when the sheep first came on to his land they were mere trespassing sheep, and he did not take or carry them away. The definition in section 1 of the Larceny Act, 1916, which applies to stealing

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by finding is this: "The expression 'takes' includes obtaining the possession (*a*) by any trick; (*b*) by intimidation; (*c*) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; (*d*) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps." It is perfectly true that he found the sheep on his land but, having found them, he did not do anything until the incident of their trespassing on Mr. Marr's land and his bringing them back, which would amount to carrying away. The form of the old indictment was: "Steal, takes, carries away." The prisoner must not only take but actively or constructively take away. In the old case of RILEY (1853) 1 Dears.C.C. 149, which has recently been upheld in the Divisional Court in RUSE *v.* READ, 33 Cr.App.R. 67; [1949] 1 K.B. 377, Parke B. observed (at p. 158): "The prisoner being originally a trespasser, he continued a trespasser all along, just as at common law, a trespass begun in one county continued in another and, being a trespasser, the moment he took the lamb with felonious intent, he became a thief. He at first simply commits a trespass; but as soon as he entertains a felonious intent, that becomes a felonious trespass." If the original taking or taking away is innocent, it has always been held that a subsequent dishonest attempt to convert the goods to the prisoner's own use does not amount to larceny. The appellant here found the sheep on his land. They simply remained on his land and, I am going to assume, he did not, or could not, distrain, but the mere keeping of them on his land would not be enough to constitute larceny. He saw the sheep on his land, but he did nothing which could be described as taking away. Then, when the sheep got on to Mr. Marr's land, he drove them back. He knew perfectly well that they did not belong to him. No suggestion was made that in taking them back he was taking them back because they were subject to damage feasant. He simply took them back and kept his mouth shut. The learned judge seems to have thought throughout the case that it was the original finding of the sheep on his land which constituted

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larceny. In the opinion of the court, the original finding was not larceny. Mr. Durand, who did not appear for the prosecution below, has very properly admitted that here, and as it was not put to the jury that they would have to find that the felonious taking was the driving off, and that was never properly explored, in our opinion this conviction cannot stand and it is quashed.

Conviction quashed.

Solicitors: Woodcock, Ryland & Co., agents for Ivor Rees, Haverfordwest, for the appellant; W. J. Philipps Williams, Haverfordwest, for the Crown.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SELLERS AND MR. JUSTICE HAVERS

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BILLING *v.* PILL

Larceny—Thing Capable of Being Stolen—Property "Attached to and Forming Part of Realty"—Army Hut—Floor Secured by Bolts to Concrete Base—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 1 (3) (*a*).

The appellant was convicted of stealing from a former gun emplacement a wooden army hut. The hut, which was comprised of seven sections without doors or windows, rested on a concrete foundation and the floor was secured to the concrete base by bolts. After dismantling the hut with a view to removing it, the appellant did not at any time abandon possession of it.

Held, that though the base had become a part of the realty, the hut itself, having been built for a temporary purpose was not "attached to or forming part of the realty" within the meaning of section 1 (3) of the Larceny Act, 1916, and was, accordingly, a thing capable of being stolen. The conviction was, therefore, right.

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Case stated by Cornwall justices.

At a magistrates' court at Torpoint on February 27, 1953, an information was preferred by James Arthur Henry Pill, a police officer (" the prosecutor "), charging Cecil Lloyd Billing (" the defendant ") with having, between January 1, 1951, and October 31, 1952, at the parish of Antony stolen an army hut, value £50, the property of the War Department, contrary to section 2 of the Larceny Act, 1916.

At the hearing of the information the following facts were proved or admitted. The War Department possessed a site at Tregantle, near Torpoint, which was used during the war as a gun emplacement, when between forty and sixty huts were erected on the site. The hut, the subject of the charge was comprised of seven sections without doors or windows. It rested on a concrete foundation and the floor was secured to the concrete base by bolts let into the concrete. In 1946 the huts were vacated, but remained under the control of the War Department. Squatters, who moved into certain huts, were cleared from the site between 1947 and the end of 1952 by the St. Germans Rural District Council acting on behalf of, and at the request of, the Ministry of Health. The method used was to take away the doors and windows of the unoccupied huts so as to deter further squatters and to demolish those occupied by the squatters as they became vacant. In May or June, 1951, the appellant, without any lawful authority, by two of his servants demolished one hut which was without doors or windows, and, without abandoning possession thereof, took seven sections away and subsequently re-erected the hut on his own land. It took three days to dismantle the hut and remove the sections.

It was contended on behalf of the defendant that under section 1 (3) (*a*) of the Larceny Act, 1916, the hut was not capable of being stolen as it was attached to or formed part of the realty, and, although he had severed it from the realty, he had not abandoned possession of it prior to removing it from the site. It was contended on behalf of the prosecutor that the hut was not attached to or forming part of the realty so as to prevent its forming the subject of a charge under section 2.

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The justices were of opinion that the hut was a purely temporary structure and was capable of being stolen. They convicted the appellant, who appealed to the Divisional Court.

W. M. Huntley, for the appellant.
P. M. Wright, for the respondent.

THE LORD CHIEF JUSTICE: This is a case stated by justices for the county of Cornwall, which raises an interesting and short point on the law of larceny, in the course of which we have had the advantage of a clear and careful argument of Mr. Huntley for the appellant and Mr. Wright for the respondent. [His Lordship stated the facts as set out above and continued:] There is no question that there was evidence upon which the justices could find that the hutted camp was a temporary camp, and that the hut could be moved and was a purely temporary structure.

It must be remembered that the Larceny Act, 1916, was intended to be a consolidating Act and was not intended to alter the law in any way. There are dicta in some cases in the Court of Criminal Appeal of Avory J. (who, it is well known, was the draftsman of the Act) that it was not intended to alter the law of larceny. Under the old common law of larceny there were many difficulties in the way of preferring a charge of theft in respect of anything which, if I may use a convenient expression, savoured of the land. Many additions were made to the law from time to time by statute, and most of them will be found in section 8 of the Larceny Act, 1916. But the section with which we are concerned is section 1 (3) which defines the offence of larceny. It provides: "Everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen. . . ." If one stops there, it is perfectly clear that anything adhering to the land that can be severed is capable of being stolen. Then there is a proviso, which has given rise to the difficulty in this case: "Provided that—(*a*) save as hereinafter expressly provided with respect to fixtures, growing

things, and ore from mines, anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof. . . ."

The construction I put upon that subsection is this, that things which adhere to the realty can be stolen after they have been severed, but a person who actually severs them (subject to the provisions of section 8 of the Larceny Act, and one or two other sections with which we are not concerned) cannot be convicted of larceny unless after the severance he has left the thing on the land and then gone back, on what I may call a separate excursion, and taken it. When he has abandoned possession, the thing has reverted to the possession of the person on whose land it was. Therefore, I think the whole of this case comes down to the meaning of the words " anything attached to or forming part of the realty." Those words might be read as meaning " attached so as to form part." It seems odd that a thing can be attached to the realty and yet not form part of the realty. If it is really attached to the realty and may form part thereof, we have to consider whether the thing is attached to the realty in the sense in which those words are used in this subsection.

In my opinion, the proviso is aimed at preserving the old common law position that a person cannot be charged with stealing real property. Now what is real property? Land, of course we all know, is real property and if things are so attached to the land that they become part of the land then, in the language which conveyancers and others have generally applied, those things become, as between a landlord and tenant, landlord's fixtures as they are sometimes called. I do not need to go into the elaborate distinctions that were dealt with by Lord Ellenborough in ELWES *v.* MAW (1802) 3 East 38 as to how fixtures pass between mortgagor and mortgagee and landlord and tenant. The point is: Is the thing a fixture? What is a fixture? First of all, the commonest fixture is a house. A house is built into the land, so the house in law is regarded as part of the land. The house and the land are one thing. If

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therefore, there is something—and lead pipes are a very good illustration—which is an integral part of the house, it follows that, as the house is an integral part of the land, the pipes also will be fixtures and will be attached to or form part of the land. If there is a chattel that is affixed in some way, the true test, it seems to me, is: Was it meant to be a temporary fixture, and meant to be part of the house or the land? In a house it may be for decoration. Many questions have arisen as regards such things as tapestries, fireplaces, and ornamental chimney-pieces. I think the matter is summed up admirably in the Hailsham edition of Halsbury's *Laws of England*, Vol. 20, p. 97, paragraph 107, by du Parcq L.J.: "Whether a chattel has been so affixed to the land or buildings as to become a fixture depends on the object and purpose of the annexation, and if the chattel can be removed without doing irreparable damage to the premises, neither the method nor the degree of annexation, nor the quantum of damage that would be done to the chattel or to the premises by the removal, affect the question save in so far as they throw a light upon the object and purpose of the annexation. If the object and purpose was for the permanent and substantial improvement of the land or building, the article will be deemed to be a fixture, but if it was attached to the premises merely for a temporary purpose or for the more complete enjoyment and use of it as a chattel, then it will not lose its chattel character and it does not become part of the realty." That is a useful exposition of the law, and if one wants authority to support it, one finds a very good instance in HOLLAND *v.* HODGSON (1872) L.R. 7 C.P. 328. Blackburn J., than whom there was no higher authority on these matters, giving his judgment (at p. 335), also emphasised that one has to look at the circumstances.

Can anybody doubt that the hut in question was put there for a temporary purpose? It can be removed without doing any damage to the freehold. It is resting upon a concrete bed which is let into the land. I should say there is no question that the concrete bed has become part of the land, but this hut which stands upon it has not become part of the land merely

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because through the floor some bolts have been put to stabilise or steady the hut. It was put there merely for a temporary purpose, so that soldiers, who were going there for a presumed temporary purpose to man a gun emplacement during the war, would have somewhere to sleep.

In my opinion, it would be quite wrong to hold that this hut was attached to or formed part of the realty. It was not attached to the realty any more than a garden seat which, because it is in an exposed position and liable to be blown over, has a spike driven through it to hold it to the ground. In one sense that is an attachment, but it is not an attachment making it part of the realty. It is simply a spike put in to hold the chattel firm. In my opinion, this hut was a chattel, remained a chattel and is capable of being the subject of larceny. Therefore, the justices came to a right decision in law in convicting the appellant.

SELLERS J.: I agree with my Lord's judgment, for the reasons which he has given.

HAVERS J.: I agree.

Appeal dismissed.

Solicitors: Reed & Reed, agents for Caunter, Veening & Harward, Liskeard, for the appellant; Jaques & Co., agents for Stephens & Scown, St. Austell, for the respondent.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SELLERS AND MR. JUSTICE HAVERS

FRANK FREDERICK CREASEY

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Jury—Threatened Disagreement—Direction of Judge.

A jury, after retiring to consider their verdict, returned into court and announced that they were unable to agree. The judge then directed them, " It is very desirable that you should

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come to a conclusion one way or the other . . . because it only means that some other jury have got to do your work for you all over again, if you do not . . . and that is why it is highly essential that you should come to a definite conclusion. It is a hardship upon all concerned if you do not. The way that juries arrive at a verdict is, of course, by a method of one member listening to what the other has to say and by a process of give and take. Of course, it is a verdict which you must all be agreed upon one way or the other. . . ." The jury then retired again and convicted the appellant.

Held, that the direction was proper.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on June 26, 1953, of conspiracy to defraud and was sentenced by the Recorder of London to twelve months' imprisonment.

The case is reported on one point only.

The jury, after retiring, came back into court and announced that they were unable to agree. The Recorder then directed them as follows: "It is very desirable you should come to a conclusion one way or the other . . . because it only means that some other jury have got to do your work for you all over again . . . and that is why it is highly essential that you should come to a definite conclusion. . . . It is a hardship upon all concerned if you do not. The way that juries arrive at a verdict is, of course, by a method of one member listening to what the other has to say and by a process of give and take. Of course, it is a verdict which you must all be agreed upon one way or the other. . . ." The jury then retired again, and brought in a verdict of Guilty.

P. A. Marrinan, for the appellant.
Henry Elam, for the Crown.

THE LORD CHIEF JUSTICE: This case raises once again the question of the direction to be given by a judge to a jury when they come back and say that they are not in agreement. It would be very unfortunate if anything we said led courts to think that when a jury come back, perhaps after a considerable

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time, and say that they are not agreed with regard to the guilt of either one prisoner or one of several prisoners that the court is not entitled, within proper limits, to urge them to try again and see if they cannot come to a verdict, and also to remind them that they are a collective body and that they must come to their verdict by a process of what, for convenience, is called "give and take." It would be most unfortunate for this court to try to lay down a formula which judges are to use in such cases. There have been cases in which the direction has been given in such a way that this court could not approve. There was, for instance, one case where the judge finished his direction by saying: "It is essential that you should give a verdict." It is not essential that they should give a verdict in the sense that they cannot be discharged until they have given a verdict, because everyone knows nowadays that, if a jury disagree, it is in the discretion of a judge whether he will discharge them at once or how long he will keep them.

We are certainly not going to lay down a rule that, because a jury come back and say that they are not able to agree in the case of a particular prisoner, whether he is indicted alone or with others, that the judge should say at once: "I will discharge you and have the case tried over again." There was another case a year ago where the judge told the jury to consider whether or not the prisoner might be guilty, not whether he was guilty, and this court thought the safer course, especially as it was not a clear case, was to quash the conviction. In this case the learned Recorder, with his experience of these matters, himself had no doubt of the justice of the verdict and, having considered the whole of the direction which he gave to the jury when they came back, we do not think any sensible jury could have misunderstood what he meant when he said that they should go back and see if they could come to a conclusion one way or the other. Perhaps it might have been put a little differently.

We cannot lay down a formula which all judges and Recorders should use on such occasions, and we do not think that the conviction calls for interference. As the point was a

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fair one to put forward, any time over six weeks during which the appellant has remained in custody awaiting the appeal will count towards his sentence.

Appeal dismissed.

Solicitors: Lesser & Co., for the appellant.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SELLERS AND MR. JUSTICE HAVERS

1953
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D'ANDREA *v.* WOODS

Receiving Stolen Property—"Property"—Stolen Stamps Converted into Notes—Some of Notes Received by Defendant with Guilty Knowledge—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 46 (1).

By section 46 (1) of the Larceny Act, 1916, "the expression 'property' . . . includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise. . . ."

A number of stolen savings stamps belonging to C. were converted by the thief into Bank of England notes, and a number of these notes amounting to £4 10s. were received by the defendant, who knew at the time how they had been obtained.

Held, that the defendant was properly convicted of receiving £4 10s., moneys of C., as the notes fell exactly within the above definition of "property into or for which [the stolen property] has been converted or exchanged."

Case stated by a metropolitan magistrate.

At North London Magistrates Court on April 4 and May 4 and 27, 1953, an information was preferred by Detective-Inspector Leonard Woods ("the prosecutor") charging

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Dominic D'Andrea (" the defendant ") that on March 19, 1953, he received £4 10s., moneys of one Sheila Cox, knowing the same to be stolen, contrary to section 33 (1) of the Larceny Act, 1916.

The following facts were proved or admitted on the hearing of the information. Between March 18 and 19, 1953, Jeanne Boorer and Doreen Stone stole in a hostel a quantity of savings stamps to the value of £17 5s. belonging to Sheila Cox. Jeanne Boorer converted the stamps for their full cash value and gave half the proceeds to Doreen Stone. On March 19, 1953, Jeanne Boorer handed the defendant four £1 Bank of England notes and one 10s. Bank of England note, being part of the proceeds of the conversion of the stolen stamps, and at the same time told him how she had obtained the notes. The defendant admitted that he knew how the notes had been obtained.

It was contended on behalf of the defendant that, as the notes were only the proceeds of stolen property and not themselves stolen, the charge could not be sustained. It was contended on behalf of the prosecutor that, by virtue of section 46 (1) of the Larceny Act, 1916, the word " property " in section 33 (1) included any property into, or for which, the same had been converted or exchanged.

The magistrate convicted the defendant, who appealed.

C. L. Collymore, for the appellant.
Paul Wrightson, for the respondent.

THE LORD CHIEF JUSTICE: This is a case stated by Mr. Seymour Collins, one of the Metropolitan magistrates, before whom the defendant was convicted of the offence of " receiving the sum of £4 10s., moneys of Miss Sheila Cox, knowing the same to have been stolen, contrary to section 33 of the Larceny Act, 1916."

The facts found by the magistrate show that property, namely, stamps of Miss Sheila Cox, were stolen by some girls, and they or one of them managed to turn the stamps into

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money by selling them and, having received £17 5s., they then handed to the defendant £4 10s. and the magistrate has found that the bank notes which they handed to the defendant were some of the bank notes which they had obtained by selling the stamps. The magistrate has also found that the defendant admitted that he knew these bank notes were the proceeds of the theft. By section 46 (1) of the Larceny Act, 1916, it is provided: "The expression 'property' includes any description of real and personal property . . . documents of title" and so forth, and includes "not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise." Obviously the Act was contemplating the theft of property which was subsequently changed into some other property or into money, and that money being used to buy something else, because the subsection provides: "Not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise." It is quite sufficient to say here, without going further, that this £4 10s. falls exactly into the definition of property into or for which the stolen property has been converted or exchanged. Therefore, as the defendant knew that these notes had been acquired by theft, he was properly convicted. This appeal fails and is dismissed with costs.

SELLERS J.: I agree.

HAVERS J.: I agree.

Appeal dismissed.

Solicitors: A. P. B. Gould, for the appellant; The Solicitor, Metropolitan Police, for the respondent.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HAVERS AND MR. JUSTICE GLYN-JONES

WILLIAM ALFRED POWELL

1953
Oct. 28

Magistrates—Chairman of Examining Justices Presiding at Trial—Undesirability of Practice.

Sentence—Preventive Detention—Recidivist in Crime—Spells of Honest Work Between Convictions.

Although there is no rule of law that the chairman of justices who have committed a prisoner for trial at quarter sessions may not preside at the trial at quarter sessions, the practice is undesirable and, as a general rule, it should be arranged for the trial to take place in a court in which that magistrate is not presiding.

A sentence of preventive detention is appropriate for a prisoner, who, in addition to having the requisite number of previous convictions, has shown by his conduct that he is a recidivist in crime, and if he has shown by his conduct and history that he cannot be trusted to abstain from crime, such a sentence is appropriate, although he may have done spells of honest work between convictions.

Application for leave to appeal against sentence.

The applicant pleaded Guilty at Monmouthshire Quarter Sessions on July 4, 1953, to larceny and to carrying an offensive weapon contrary to section 1 of the Prevention of Crime Act, 1953, and was sentenced by the Deputy-Chairman to concurrent terms of five years' and two months' imprisonment.

No counsel appeared.

THE LORD CHIEF JUSTICE: It is necessary to say a word about this case. The applicant pleaded Guilty at Monmouthshire Quarter Sessions to the larceny of a quantity of copper cable and to carrying an offensive weapon, contrary to section 1 of the Prevention of Crime Act, 1953. He was

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sentenced to five years' imprisonment for the larceny and two months' imprisonment concurrent for the offence under the Prevention of Crime Act. He applies for leave to appeal against his sentence, and the first ground of appeal is that the Deputy-Chairman who sentenced him was also chairman of the examining magistrates who committed him for trial. The learned Deputy-Chairman has reported to the court.

We cannot say that there is any reason in law why the chairman of committing magistrates who happens to be a Chairman or Deputy-Chairman of Quarter Sessions should not sit to deal with the case at quarter sessions in that capacity, though no doubt it is not altogether desirable that that should take place and, as a general rule, if it so happens that a case has been committed by a bench on which either the Chairman or the Deputy-Chairman of Quarter Sessions was sitting, it should be arranged that the prisoner when tried on indictment should be brought before one of the courts in which that magistrate is not presiding. But it is not a ground in law on which we could interfere with the sentence and, in this case, there is no question about the conviction because he pleaded Guilty.

There is one other matter the court thinks it necessary to point out for the guidance of this particular Deputy-Chairman, who apparently does not understand, or has not read, what the court has said on previous occasions on appeals from him. This was a case in which the sessions appear to have considered that it would have been proper to have passed a sentence of preventive detention. The applicant has a very bad record, and it is just the sort of case for which Parliament has provided preventive detention. The Deputy-Chairman said the bench would have given preventive detention but for the decisions of this court, which he seems to have thought prevented him from doing so. It is perfectly true that soon after the present Act, the Criminal Justice Act, 1948, came into force, this court did in ASKEW [1949] 2 All E.R. 687 say that preventive detention should be kept and was intended to be kept for habitual criminals, and it was not every person who had the

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statutory number of convictions, which are three, that should be sent to preventive detention. The learned Deputy-Chairman seems to have thought that the court was laying down that, unless the prisoner was one who could have been convicted under the former Prevention of Crime Act, 1908, as an habitual criminal, it was not right to give a sentence of preventive detention. That was not what the court meant, and I do not think it was what the court said. I do not know what report the learned Deputy-Chairman read, but it was not intended by this court to say that a sentence of preventive detention could only be given where the prisoner could have been convicted under the old Act as an habitual criminal. What we meant was that where a man has shown by his conduct that he is a recidivist in crime, that is a case in which preventive detention should be given, but that it was not necessary to give preventive detention every time it was brought to the notice of the court that he had three previous convictions. That was pointed out emphatically by this court, consisting of Hilbery, Streatfeild and McNair JJ. in an appeal from this learned Deputy-Chairman in November, 1952—GARDNER (unrep.)—and I hope it will now be understood that the court is not attempting to put any limit on the provisions Parliament has made, save that they have indicated that the mere fact that a man has three previous convictions and is over thirty years of age should not, *ipso facto*, render him liable to preventive detention. Preventive detention ought to be kept for prisoners who have shown by their conduct and previous history that they cannot be trusted to abstain from crime, though they may do spells of honest work between convictions.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CROOM-JOHNSON AND MR. JUSTICE GLYN-JONES

1953
Nov. 2

THOMAS EDWARD CANNELL

Sentence—Corrective Training—Sentence of Imprisonment Already Being Served—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21.

A sentence of either corrective training or preventive detention to commence at the conclusion of a sentence of imprisonment already being served may properly be passed.

Application for leave to appeal against sentence.

The applicant pleaded Guilty at Oxford City Quarter Sessions on October 15, 1953, to two offences of housebreaking and larceny, four other offences being taken into consideration. He was sentenced by the Recorder to three years' corrective training to commence on the expiration of a sentence of two years' imprisonment passed on May 16, 1953, which the applicant was already serving.

No counsel appeared.

THE LORD CHIEF JUSTICE: The applicant pleaded Guilty before the learned Recorder of Oxford to two offences of housebreaking and larceny, and four other cases were taken into consideration. The Recorder passed a sentence of three years' corrective training, to follow a sentence of two years' imprisonment which was then being served by the applicant.

The learned Recorder felt some difficulty about the case, in the first place, because the court which passed the sentence of two years' imprisonment had heard of the outstanding charges but, for some reason which did not appear and of which the learned Recorder did not know, refused to take them into consideration; secondly, he felt some doubt about a sentence of corrective training following a sentence of imprisonment. He thought, however, that corrective training was the right

sentence to impose, and he ordered that that sentence should start when the sentence of imprisonment had been completed.

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There is no difficulty in sentencing a person who is serving a sentence of imprisonment either to corrective training or to preventive detention. Such a sentence can be made to begin only at the conclusion of the sentence which he is already serving, but if this court thinks that a sentence of corrective training or preventive detention to date from the original conviction is proper, they can impose it and that will at once take the place of the sentence of imprisonment. In other words, the shorter sentence will be merged in the longer.

This was a bad case, and a substantial sentence was called for. If the sentence of two years' imprisonment to be followed by three years' corrective training were to stand, the total sentence would, subject to remission, be one of five years. The court thinks it better to grant a reduction in this way: We will give leave to appeal, treat this application as the hearing of the appeal, and substitute for the sentence of three years' corrective training to commence at the end of two years' imprisonment a sentence of four years' corrective training, to date from the original conviction on May 16.

Sentence reduced.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HAVERS AND MR. JUSTICE GLYN-JONES

HARRY RICHARD PAGE

1953
Oct. 26;
Nov. 10

Court-Martial—Jurisdiction—Murder—Killing by British Soldier of Alien Abroad—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 9—*Army Act*, 1881 (44 & 45 *Vict. c.* 58), *s.* 41.

The appellant, a British soldier, killed an Egyptian in Egypt and was convicted of murder by a general court-martial

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in the Suez Canal Zone. It was contended on his behalf that, although he could have been tried for murder under section 9 of the Offences against the Person Act, 1861, by an ordinary criminal court in this country, he could not be tried by court-martial, as the person killed was not within the Queen's peace, and that the conviction was, therefore, bad.

Held, that by virtue of section 9 of the Act of 1861, and section 41 of the Army Act, 1881, a British subject can be tried and punished for murder by the criminal courts of this country or, if a person subject to military law, by a court-martial abroad (subject to the limitation introduced by the proviso to section 45 which requires that the trial shall be in a civil court in certain cases), whoever the victim was and wherever the crime was committed, and that the conviction was right.

Appeal against conviction.

The appellant, an acting corporal in the Royal Corps of Signals, was convicted on December 7, 1952, by a general court-martial at Fayid in the Suez Canal Zone of the murder in an Egyptian village of an Egyptian national and was sentenced to death, but the sentence was commuted by the confirming officer to one of imprisonment.

Kenneth Diplock, Q.C. (*J. M. Buckland* with him), for the appellant:

It is conceded that the killing was in such circumstances that it would have been murder if it had taken place in this country, but it is submitted that the conviction was bad for want of jurisdiction in the court-martial to try the appellant, because the person killed was not within the Queen's peace. In Coke's *Third Institute*, Chap. 7, murder is defined as taking place when a person of sound memory and of the age of discretion unlawfully kills within any county of the realm a reasonable creature under the Queen's peace, with malice aforethought. Before the passing of the Offences against the Person Act, 1828 (section 7 of which was, in substance, re-enacted by section 9 of the Act of 1861), the position was as follows. At common law the offence of murder included killings abroad only if both the killer and his victim were

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British subjects: SAWYER (1815) R. & R. 294; SERVA (1815) 2 C. & K. 101n. The definition of murder was not in any way enlarged by the Act 33 Hen. 8, c. 23. That Act merely conferred jurisdiction on the courts of this country to try certain offences, including murder, whether committed within or without the King's dominions. The offence which, under the Offences against the Person Acts of 1828 and 1861, the courts of this country were for the first time given jurisdiction to try, namely, the killing of an alien abroad by a British subject, was not murder at common law, but an offence unknown to the common law. Section 41 of the Army Act, 1881, when it uses the word " murder " must prima facie refer to murder at common law, and the burden rests on the Crown to show that a meaning different from the prima facie meaning is to be attributed to the word.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) (*E. Garth Moore* with him), for the Crown:

The only reason for the introduction of the words " under the Queen's peace " into the definition of murder at common law was to exclude the killing of the Queen's enemies in course of military operations. Murder from earliest times connoted unlawful killing, and although it excluded the killing of a person bearing arms against the Sovereign, it has never been further restricted.

At the conclusion of the argument the Lord Chief Justice said that the appeal would be dismissed but that, in view of the importance of the argument which had been addressed to the court, the court would put its judgment into writing at a later date.

Cur. adv. vult.

Nov. 10. The following judgment of the court was read by THE LORD CHIEF JUSTICE: We have already dismissed this appeal and now proceed to give our reasons.

The appellant, an acting corporal in the Royal Corps of Signals, was tried and convicted by a general court-martial

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assembled at Fayid in the Suez Canal Zone for the murder in an Egyptian village of an Egyptian national. He was sentenced to death and the sentence was commuted by the confirming officer to one of imprisonment. There was abundant evidence to justify the conviction and the summing-up of the Judge Advocate is not open to criticism, apart from his citation of a passage in the *Manual of Military Law* with which we deal later in this judgment. The appellant was granted leave to appeal by a single judge of this court on a question of law, namely that the conviction could not stand for the reason that the murdered man was not within the Queen's peace. The argument submitted by Mr. Diplock on his behalf was that the common law definition of murder is that stated in Coke's *Third Institute*, Chap. 7, at p. 47, where he says: "Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature under the King's peace with malice aforethought." He contended that a court-martial could only try a case of murder if it came within this common law definition and could not try one in which recourse had to be made to statutory provisions which had made murder committed abroad triable and punishable in this country. As will be seen hereafter, the case really depends upon the true construction of section 41 of the Army Act. Considering that section 9 of the Offences against the Person, Act, 1861, provides that where any murder is committed by any subject of Her Majesty on land out of the United Kingdom, whether within the Queen's dominions or without and whether the person killed is the subject of Her Majesty or not, then the offence may be dealt with in all respects as if it had been committed in England in any county or place where the suspected person is apprehended or is in custody, it is not strictly necessary for the purposes of this case to consider the old law on the subject. All that it is necessary to ascertain is whether the law as now laid down in that section can be applied by a court-martial. In deference, however, to Mr. Diplock's learned and careful argument we will deal shortly with the position as it was before that statute.

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It is no doubt true that the general rule of English law is that offences committed by British subjects out of England are not punishable by the criminal law of this country. We need not explore the origin of this doctrine. Suffice it to say that it depends partly on the law of nations, which would regard an offence committed on the soil of one nation as at least primarily the concern of the Sovereign of that country; but one can also see the procedural difficulty which would have occurred to a medieval lawyer, who would be unable to understand how the jury of presentment consisting of persons taken from the vicinage could have knowledge of crimes committed abroad sufficient to present them to the Sovereign's courts. It is enough to say that certainly from the reign of Henry VIII this rule has been subject to statutory exceptions. Crimes of the present day which can be tried in England, though committed abroad, are treason, homicide, bigamy and offences against the Foreign Enlistment Act and there may be others, but these instances will suffice. The first Act which dealt with a crime committed abroad was, we believe, 33 Hen. 8, c. 23. This enabled persons charged with treason or murder to be tried in any county at whatsoever time or place, within the King's dominions or without, the offence was considered to be committed. It is curious that, although Coke in his definition speaks of a killing within any county of the realm, he makes no mention of this statute. We can find no reference in the chapter on murder to the Act or any observations as to the possibility of trying a person in this country for a murder committed abroad. In our opinion, this lends considerable force to the view which has often been advanced in arguments in cases on this subject and by some text writers that his reference to the King's peace in his definition is meant only to except from murder killing in the course of war and, possibly, rebellion. That Act was considered in SAWYER (1815) R. & R. 294, but a much fuller report appears in a note to SERVA (1845) 2 C. & K. 53, at p. 101. The prisoner there was indicted for the murder of a woman in Portugal who was said to have been "in the peace of God and our Sovereign Lord the King." The argument which took place

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was on the sufficiency of the indictment, which, it was said, should have contained an averment that both the prisoner and the victim were British subjects. The case was reserved for the consideration of the twelve judges and in delivering their opinion Le Blanc J. said (at p. 113): "As to the second objection, that it is not alleged that they were British subjects, the statute 33 Hen. 8, c. 23, nowhere requires that; but, taking it that the jurisdiction only extended to British subjects, the judges are of opinion that sufficient is stated on the indictment to put the other party on showing the contrary. It stated the deceased to be in the peace of our Lord the King, and that the offence was against his peace." But it is to be observed that they gave no opinion as to whether if the deceased had not been a British subject the conviction would have been bad, though it seems that their view was to the contrary by the reference to the statute of Henry VIII which we have quoted. It is also to be observed that in the course of the argument Lord Ellenborough said (at p. 112): "Against the peace of the King applies to the offender: it relates to his capacity to commit the crime." That, of course, is entirely intelligible. Nobody would suggest that an English court could try an alien for an offence not committed on British soil. That case was heard in 1815, and in 1828 was passed the Offences against the Person Act of that year which provided for the "trial of any of His Majesty's subjects charged in England with murder committed on land out of the United Kingdom whether within the King's dominions or without." Now it is true that in HELSHAM (1830) 4 C. & P. 394, Bayley J., after conferring with Bosanquet J., directed an allegation that the prisoner and the deceased were subjects of His Majesty to be inserted in the bill. There was no judgment as to the necessity of the allegation that the deceased was a British subject, and the note of the summing-up only shows that it was left to the jury to say whether they were satisfied that the prisoner was a British-born subject. On the other hand, in 1843 in AZZOPARDI, 2 Mood.C.C. 288, the prisoner, a British subject being a native of Malta, murdered a Dutch woman in Smyrna. He was tried in this country and

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the objection was taken that the victim was a foreigner, but the conviction was affirmed. It was, no doubt, to allay any doubts that there may have been on this subject that section 9 of the Offences against the Person Act, 1861, is in the wide terms to which we have already referred. It is therefore abundantly clear, and indeed Mr. Diplock admitted, that, had the appellant been brought to this country and tried here, the question as to the nationality of the victim could not have arisen. We have no doubt that when the word " murder " is found in a statute it has the meaning which has always been attached to it throughout the ages, namely, an unlawful killing with malice aforethought.

We turn now to section 41 of the Army Act. It is in these terms:—" Subject to such regulations for the purpose of preventing interference with the jurisdiction of the civil courts as are in this Act after mentioned, every person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law, and if charged under this section with any such offence (in this Act referred to as a civil offence) shall be liable to be tried by court-martial, and on conviction to be punished as follows."

Then there follow in separate paragraphs five offences, treason, murder, manslaughter, treason-felony and rape for which the punishment is prescribed. Paragraph 5 deals with any other offences which, when committed in England, are punishable by the law of England and provides that a person subject to military law shall " be liable whether the offence is committed in England or elsewhere either to be punished as in respect of an act to the prejudice of good order and military discipline or to suffer any punishment assigned for such offence by the law of England." There is then a proviso that a person subject to military law shall not be tried by court-martial for any one of the five specified offences committed in any place within His Majesty's dominions other than the United Kingdom and Gibraltar unless the offender was on active service or the place where the offence was committed was more than

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100 miles from any town in which he could be tried by a competent civil court. The object of this proviso and indeed of the regulations as mentioned in the first part of the section is to ensure that persons charged with these grave offences shall be tried when possible by a civil court and not by a court-martial. It is to prevent any conflict of jurisdiction between civil and military courts. In our opinion the plain meaning of the section is that a court-martial can try a person subject to military law for any offence wherever committed which would be an offence against the law of England, subject only to this, that the section provides for the trial of the prisoner before a civil court instead of court-martial in the circumstances set out in the section and regulations. Our attention has been called to passages in Chapter 6 of the *Manual of Military Law*, pp. 131–132 of the 1951 edition. It is there stated that it must be proved in the case of murder that the victim was under the Queen's peace and that the Army carries the Queen's peace with it wherever it goes. So far as this may appear to assert that an alien who is not at the time of the crime within Her Majesty's dominions or territories is within her peace we cannot assent to it, at least unless the territory has been effectively occupied by her forces. Nevertheless, the legislation to which we have referred enables a subject of Her Majesty to be tried and punished in the courts of this country or, if subject to military law, by a court-martial abroad, for murder whoever the victim and wherever committed. Coke's definition of murder applies to those cases which were triable in the common law courts of his day, namely, where murder was committed within the realm, though we have already pointed out that that very learned person had strangely enough omitted to notice the statute of Henry VIII.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE PARKER

HENRY LEONARD ASQUITH WINES

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Falsification of Accounts—Intent to Defraud—Inflation of Gross Profits of Department—Intent to Avoid Dismissal from Employment—Summing Up—Falsification of Accounts Act, 1875 (38 & 39 *Vict. c.* 24), *s.* 1.

The appellant, who was the manager of the radio department of a co-operative society, was convicted (inter alia) of falsification of accounts. He admitted that he had made false entries, but denied that he had done so, as was suggested by the prosecution, with the object of covering up thefts by him. His contention was that he had done so with the intention of making the gross profit of his department appear higher than it was, in order to retain his employment. The Recorder directed the jury that there was an intent to defraud, whichever of the two versions was true.

Held, that the direction was correct, as, on the appellant's own version, he intended by the false entries to induce the society to retain him in their service and pay him wages and thereby acting to their financial detriment.

Dictum of Buckley J. in *Re* LONDON & GLOBE FINANCE CORPORATION, LTD. [1903] 1 Ch. 728, at p. 732, followed.

Appeal against conviction.

The appellant was convicted at Oxford City Sessions on January 6, 1953, of larceny of wireless sets and other articles, of conspiracy to steal, and of falsification of accounts, and was sentenced by the Recorder to four years' imprisonment on each count, the sentences to run concurrently.

The appellant, who was the manager of the radio department of a co-operative society, gave evidence admitting that he had falsified the accounts, but denied that he had done so, as was suggested by the prosecution, with the object of covering

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up his thefts. He said that his object was to make the gross profit of his department appear to be 24 per cent., instead of 16 per cent., the true figure, and that he believed that, if he showed 16 per cent. only, he would be dismissed from his employment.

The material portions of the summing-up are set out in the judgment.

F. L. Clark, for the appellant.
R. G. Micklethwait, for the Crown.

THE LORD CHIEF JUSTICE [after stating the facts] : The only difficulty which has arisen is this : The appellant was convicted, on certain counts of the indictment, of falsifying accounts. The suggestion for the prosecution, and by far the most probable reason, for the falsification was that the appellant desired to cover up his thefts. The appellant, however, went into the witness-box and swore that the reason why he falsified the accounts was to make it appear that the gross profit of his department was 24 per cent. instead of the true figure, 16 per cent. He said that he feared that, if he showed only 16 per cent. profit, he would be dismissed and lose his employment.

The only point with which we are concerned is whether the direction which the learned Recorder gave to the jury was right. The jury did not state whether they accepted the version of the prosecution or the version of the defence. He directed the jury, in effect, that it did not matter which version was true, as on either version there was evidence of an intent to defraud. He said this : " If, therefore, you are satisfied, as Wines himself has admitted, first, that he is a servant, which has been proved, secondly, that he made a false entry in the document, which is admitted, and thirdly, that the object of it was either, as the prosecution ask you to infer, to conceal the depredations which had been made in the stock, or, as Wines himself says, in order to keep a job which he would have lost if he had not made these false entries, if that was the intention, then that is an intent to defraud and the charge is made out."

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Counsel for the appellant has contended in a very clear argument that that amounted to a misdirection. If it was a misdirection, we should have to quash the conviction on the counts for falsification, although I say at once that that would not make any difference to the sentence, because the learned Recorder passed a sentence on each count to run concurrently. The point whether the direction was correct in point of law is, therefore, an academic one, but one of some importance.

Having had the advantage of a full argument, the court has come to the conclusion that the Recorder's direction can be upheld and was correct. The definition which has so often been given of the difference between an intent to deceive and an intent to defraud is to be found in Buckley J.'s judgment in *Re* LONDON & GLOBE FINANCE CORPORATION, LTD. [1903] 1 Ch. 728, at p. 732: "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action." That is the *locus classicus* on the subject. It has been cited with approval over and over again, and, therefore, one has to consider in all these cases whether the deceit which has been practised has merely induced, or was intended to induce, a state of mind, or has induced a course of action.

One thing that is clear is that the appellant has himself said what he intended to achieve by the falsification, namely, to remain in the service of the society; in other words, to avoid being dismissed by them, which he feared would happen if he made a proper return. If he had been dismissed because he did not show a satisfactory return, he would have lost his wages, and therefore the society, by his falsification, assuming his object to be what he said it was, would be induced to retain him in their service and pay him wages, and he was thereby getting wages from the society by means of falsifying the accounts.

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For these reasons we think that the learned Recorder was justified, in view of what the appellant himself said, in directing the jury that, whether they thought that the object of falsification was to conceal the thefts—and I should think that there is very little doubt that that really was in the appellant's mind—or whether they thought that it was merely to induce the society to keep him in their employ and pay him his wages, there was in the circumstances an intent to defraud, and that, therefore, the direction was right. For these reasons the appeal is dismissed. With regard to the sentence, we cannot possibly interfere.

Appeal dismissed.

Solicitors: H. J. A. Astley, Oxford, for the Crown.

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THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE SELLERS

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REGINALD HORACE ALGAR

Evidence—Competency of Witness—Former Wife of Prisoner—Decree of Nullity on Ground of Husband's Impotence—Offence During Coverture.

Impotence of a spouse merely renders the marriage voidable at the suit of the other spouse, and until the marriage has been so avoided it remains valid and subsisting. The incompetency which attaches to a spouse as a witness still attaches, therefore, after a decree of nullity on the ground of impotence in respect of any matter arising during the coverture.

Where, therefore, on the prosecution of the appellant for forgery his wife, who before the prosecution had obtained a decree of nullity on the ground of his impotence, was called by the prosecution as a witness against him in respect of an offence committed during the period of coverture, and gave evidence on a vital matter,

Held, that the conviction must be quashed.

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Appeal against conviction.

The appellant was convicted at Norfolk Assizes on June 10, 1953, of forgery and was sentenced to five years' imprisonment.

The appellant married his wife in 1934 and they lived together till 1949. She had a substantial banking account, and the allegation of the prosecution was that in 1947 and 1948 the appellant forged her name to thirty-two cheques and thereby fraudulently obtained about £7,000. The wife sued the bank, who, after a day's hearing, submitted to judgment. On March 21, 1950, after the alleged forgeries had been committed, but before the hearing of the action against the bank, the wife obtained a decree of nullity on the ground of the appellant's impotence. At the appellant's trial the wife was called as a witness for the prosecution, and gave evidence on a vital point.

J. H. Buzzard, for the appellant:

The rule at common law is accurately stated in the first edition of *Roscoe on Criminal Evidence* (1835) as follows: "Where the relation of a husband and wife has once subsisted, the one is inadmissible for or against the other, even after the relation has ceased, with respect to matters which occurred during the continuance of the relation." No case precisely on all fours with the present appeal can be found in the textbooks, but the rule was first stated and applied in a case where the parties had been divorced by Act of Parliament: MONROE *v.* TWISTLETON (1802) Peake's Add.Cas. 219, and in 1824 was extended to a case where the marriage had terminated by the death of one of the parties: DOKER *v.* HASLER (1824) Ry. & M. 198. In both these cases the *ratio decidendi* was the necessity of preserving confidence between man and wife. These two cases were approved and applied by the Court of Common Pleas in O'CONNOR *v.* MARJORIBANKS (1842) 4 Man. & G. 435, where Maule J. said, at p. 445: "The textbooks generally give as the reason for the rule . . . the necessity of preserving the confidence of conjugal relation . . . but it by no means follows that the rule is conservative with the reason given in support of it . . .

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a rule may be a very good rule, though the reason on which it is founded may not be applicable to every case which is governed by the rule."

WELLS *v.* FISHER (1831) 1 Mood. & R. 99 is a good example of a case where the rule did not apply, because the marriage, being bigamous, was void *ab initio*. The reference to a *de facto* marriage in the note to that case can be traced back through the first edition of *Starkie on Evidence*, Pt. IV, at p. 711, to a case of a forced marriage referred to in the sixth edition of *Gilbert on Evidence* (1801) at p. 119—another example of a marriage void *ab initio*. YOUNG (1851) 5 Cox C.C. 296 is a similar example, where the marriage was void *ab initio* as being within the prohibited degrees. The reference in that case to CHADWICK (1847) 11 Q.B. 173 indicates that the decision might have been otherwise if it had been given before the Marriage Act, 1835, when such marriages were merely voidable.

It is now necessary to see how far, if at all, the common law rule has been modified by statute so far as criminal proceedings are concerned. [*Maxwell Turner*, for the Crown, conceded that the present appeal was not covered by any of the common law or statutory provisions allowing a wife to give evidence against her husband in particular cases.] If " wife " includes " ex-wife " in the Evidence Acts, 1843 and 1851, an " ex-wife " was specifically excepted from the operation of those statutes. If " wife " did *not* include " ex-wife," nothing in those statutes rendered an " ex-wife " competent in any proceedings, civil or criminal. A wife, and therefore *a fortiori* an ex-wife, had been previously excluded not on the grounds of interest, but on different grounds, and therefore an " ex-wife " was not rendered competent by section 1 of the Act of 1843. BARBAT *v.* ALLEN (1852) 21 L.J.Exch. 155; STAPLETON *v.* CROFTS (1852) 18 Q.B. 367.

Quite apart from these cases, the Second Report of the Commission on Common Law Procedure, 1853, at p. 19, is strong authority to show that the common law rule remained in full force, both as to civil and criminal proceedings, immediately before the Evidence Act, 1853. In sections 1 and 2 of

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that Act, the word " wife " must have the same meaning. It would seem clear that that meaning includes ex-wife, because the statute was passed expressly to modify the existing rule. The only difficulty is caused by the decision in SHENTON *v.* TYLER [1939] Ch. 620, which decided that ex-wives are *not* included in section 3. It is submitted that if the Court of Appeal in SHENTON *v.* TYLER (*supra*) had considered section 3 in relation to sections 1 and 2, rather than treating it as a separate enactment, they would have come to a different conclusion. Whatever is the meaning of " wife " in sections 1 and 2, nothing in the Act makes an " ex-wife " competent in criminal cases. If " wife " does not include " ex-wife," the only result is that " ex-wives " are still incompetent in civil as well as criminal cases—a somewhat startling proposition. Whether SHENTON *v.* TYLER (*supra*) be rightly or wrongly decided, that case is of considerable assistance in establishing what the common law rule was, and explaining why modern textbooks have not referred to the existence of that rule.

If it is rightly submitted that the common law rule still holds good at least in criminal cases, subject to the special exceptions which apply equally well to still existing marriages, it remains to consider whether the rule applies to cases such as the present appeal, where a voidable marriage has been declared null and void. The wording of the decree is misleading and has resulted from a legal fiction resorted to by the old Ecclesiastical Courts in order to assume jurisdiction in the case of voidable marriages. Three recent cases in the Court of Appeal (*Re* EAVES [1940] Ch. 109; ADAMS *v.* ADAMS [1941] 1 K.B. 536; and DE RENEVILLE *v.* DE RENEVILLE [1948] P. 100) are strong authorities in favour of the appellant.

Maxwell Turner, for the Crown :

It is conceded that a divorced wife is incompetent to give evidence of matters which occurred during the coverture. The distinction here is that, once the decree has been made absolute, the marriage is deemed never to have existed (NEWBOLD *v.* ATT.-GEN. [1931] P. 75). DODSWORTH *v.* DALE [1936] 2 K.B. 503 lays down the rule that no transactions which have been

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concluded or things which have been done during the marriage are affected by the subsequent decree, but this principle only applies to things done in the belief that the marriage existed. The language of the judgments in the cases cited by counsel for the appellant go beyond what was required for the actual decisions. The fact that legislation has been required to legitimate the children of such marriages is strongly in favour of the argument for the Crown.

J. H. Buzzard, in reply:

To quote the words of Bucknill L.J. in DE RENEVILLE *v.* DE RENEVILLE [1948] P. at p. 120, it would be "contrary to public policy and common sense" for this court to shut its eyes to the historical fact that at the material time the appellant and the witness were in the eyes of the law man and wife, with all the privileges and disabilities of the married state. While on the facts of the present case there are no merits, on the question of principle there is every merit in applying the same rule to the ex-wife where a voidable marriage has been avoided as applies to an ex-wife where the parties have been divorced.

Cur. adv. vult.

Nov. 16. The following judgment was read by

THE LORD CHIEF JUSTICE: The question for decision in this appeal is whether a spouse who has been lawfully married but has subsequently obtained a decree of nullity on the ground of the impotence of the other can give evidence against that other on his or her trial for alleged criminal offences committed during the coverture. There has been hitherto, as far as we are aware, no decision on the subject; the point was not taken at the trial of the appellant nor was it raised in his notice of appeal. He sought leave to appeal on grounds which had no substance, but the court, on perusing the papers, saw that the question arose and gave leave to appeal so as to have it argued and determined. Mr. Buzzard, who was not counsel below, undertook the case for the appellant at the request of the court and we are indebted to him for a careful and learned argument

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in which all the relevant authorities have been brought to our notice.

The facts can be stated very shortly and are that the appellant married the lady who afterwards obtained the decree in 1934. The marriage was duly and regularly celebrated and it is not contended that there was any impediment to the parties marrying. They lived together as man and wife till some time about 1949 when the wife presented a petition on the ground of the appellant's impotence. She was a woman of some means and had a substantial bank account. During 1947–48 the appellant forged his wife's name to thirty-two cheques thereby obtaining in fraud of the bank some £7,000. On discovering that her account had been depleted by forgeries, she sued the bank in February of this year and after the action had proceeded for a day before Lloyd-Jacob J. the bank submitted to judgment. The learned judge sent the papers to the Director who prosecuted the appellant for forgery. He was convicted before Havers J. at the Norfolk Summer Assizes and sentenced to five years' imprisonment. Meanwhile, after the forgeries were committed and before the action against the bank was tried, the wife had petitioned for, and subsequently obtained, a decree of nullity on March 21, 1950. As is well known, at least to lawyers, the judgment, or to use the old expression of the Ecclesiastical Courts, the sentence in such cases declares that the petitioner is and always has been free of the bonds of matrimony. The prosecution, taking the view that this was equivalent to a judgment that the petitioner never had been the wife of the appellant, accordingly called her as a witness for the prosecution. Mr. Maxwell Turner who has appeared for the Director on this appeal admitted, in our opinion rightly, that, had there been a decree of divorce, she would have been incompetent as a witness, but he contended that the position was different where the decree was one of nullity and which in terms related back so that she was never married. In view of this admission, in strictness it is only necessary to consider whether there is any difference between the legal effect of a decree of divorce and a decree of nullity

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as affecting the competence of the wife as a witness, but the case, having never before arisen, is of importance and, as decrees of divorce and nullity are far more frequent than in former days, we think it advisable briefly to review the law on the subject. Moreover, as this is, I think, the third case which has quite recently come before this court where a wife has been called against her husband, we think it may be as well to state the law of competency both in what we may call the ordinary case as well as where divorce or nullity come into question.

At common law one spouse could not give evidence against the other except in the case of offences against the person or liberty of the other party to the marriage. In such cases a spouse is both competent and compellable. There have been a considerable number of modern statutory exceptions to this rule and which allow a wife to be a competent but not a compellable witness. The Criminal Evidence Act, 1898, s. 4 (1), deals with some of these cases but not exhaustively. We need not set them out in detail. Suffice it to say that they are mostly offences against children and young persons and sexual offences. In cases permitted by sections 12 and 16 of the Married Women's Property Act, 1882, which give spouses the right to bring criminal proceedings for the protection of their property, it has been placed beyond doubt by the Married Women's Property Act, 1884, s. 1, that in such cases the spouses are both competent and compellable. Cases in which spouses can be admitted, but not compelled, to give evidence against the other are set out in the Hailsham edition of *Halsbury*, Vol. 9, pp. 218 and 219. Quite modern instances since the Criminal Evidence Act are prosecutions for bigamy (Criminal Justice Administration Act, 1914) and the Infant Life (Preservation) Act, 1929. The present case comes within none of the categories. There may be cases of forgery in which a spouse could give evidence against the other if the case could be brought within the sections of the Married Women's Property Act, 1882, referred to above, but we need not consider them, as it was the bank that was defrauded in this case.

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Now here it should be remembered that the three statutes passed in the middle of last century to reform the law of evidence affected only civil proceedings. The Evidence Act, 1843, removed the disqualification of a witness on account of interest or infamy; that of 1851 removed the incompetence of the parties themselves, and the reform was completed by the Act of 1853, which allowed the spouses of the parties to give evidence. None of these statutes applied to criminal cases. So we now have to inquire whether the incompetency in a criminal case extended beyond the actual period of coverture. MONROE *v.* TWISTLETON (1802) Peake's Add.Cas. 219, a case approved again and again, lays down in terms that a divorced wife cannot be called to testify against her husband in respect of any matters arising or conversations that had passed during the marriage. The same rule was applied in the case of a widow—DOKER *v.* HASLER (1824) Ry. & M. 198. Both of these cases were decided at *nisi prius*, the first by Alvanley C.J., the second by Best C.J., afterwards Lord Wynford. They were approved by the Court of Common Pleas in O'CONNOR *v.* MARJORIBANKS (1842) 4 M. & G. 435, where the incompetence was extended to the widow's personal representatives. The reason of the rule was stated in this case both by Tindal C.J. and Maule J. to be the necessity of preserving the confidence of the conjugal relation and this reason for the rule has been stated in much the same terms by other judges of eminence. In O'CONNOR'S CASE (*supra*) Maule J. said (at p. 445): "A rule may be a very good rule, though the reason on which it is founded may not be applicable to every case which is governed by the rule." As Lord Sumner observed in JONES *v.* JONES [1916] 2 A.C. 481, at p. 500: "Principles are like that."

All these cases were cited without criticism or dissent by the Court of Appeal as recently as SHENTON *v.* TYLER [1939] 1 Ch. 620. These decisions were all before the three statutes to which we have just referred and we need not stay to inquire what effect they had on the doctrines laid down so far as civil proceedings are concerned. This was much discussed in SHENTON *v.* TYLER (*supra*), but those Acts have no application

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to criminal law. In a criminal case, therefore, subject to the common law and modern statutory exceptions mentioned above, a spouse remains incompetent to give evidence against the other and the incompetence continues after divorce in respect of matters which arose during the coverture.

We have now to consider whether the same incompetency attaches after a decree of nullity. In our opinion this depends solely on whether the marriage annulled was void or merely voidable. A marriage is void where there is bigamy, consanguinity, non-age or where it has been celebrated contrary to the requirements of the law now collected and enacted in sections 25 to 49 of the Marriage Act, 1949. In those cases the court will regard the marriage as never having taken place and no status of matrimony as ever having been conferred. Consequently, the parties never having been husband and wife, either is competent to be called against the other: WELLS *v.* FISHER (1831) 1 Moo. & R. 99. The expression to be found in some of the textbooks and cases "*de facto* marriage" or "*de facto* wife" means in our opinion no more than that, while the parties may have appeared to be and even have believed that they were husband and wife, they were not, either because there was an impediment which prevented their marriage or that the marriage was not celebrated according to law. We say nothing about the absence of true consent, as it is possible that at least for certain purposes other questions not material to this case might arise. But impotence only makes a marriage voidable. Until it has been avoided at the suit of the aggrieved party it will be regarded by every court as valid and subsisting. The parties are husband and wife till a decree has been pronounced and if one party dies before or without one being obtained the other is the widow or widower of the deceased. The reason why the decree is in the form which declares that the petitioner is and always has been free of the bonds of matrimony was, if I may be permitted to quote a judgment of my own, shown in *Re* EAVES [1940] Ch. 109. The old sentence of the Ecclesiastical Courts following the Canon Law has been preserved, but in truth neither the petitioner nor the

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respondent has always been free. The petitioner has always been in the position to obtain freedom but until the decree the tie remains binding. Since the decision of the Court of Appeal in that case, in ADAMS *v.* ADAMS [1941] 1 K.B. 536, and DE RENEVILLE *v.* DE RENEVILLE [1948] P. 100, it is, we think, settled that the courts now regard the parties to a voidable marriage before decree to be for all purposes truly husband and wife. Unless there is a decree, they will live and die as married persons, with all the incidents that attach to that estate. We think it clear that the reason for the incompetency applies to these persons with force at least equal to the case of divorced persons. It would be artificial in the highest degree to apply a different rule in the two cases. It is with no disrespect that one can say that what is artificial is the old form of sentence in these cases which in truth perpetuates a canonical fiction. The result is that the evidence of the appellant's former wife was inadmissible, and as it dealt with a vital point in the case we cannot apply the proviso. Accordingly, the conviction must be quashed.

Conviction quashed.

CIRCUIT CASE (SOUTH-EASTERN CIRCUIT)

[ESSEX ASSIZES]

STREATFEILD J.

R. *v.* JOHN RIDER

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Carnal Knowledge—Statutory Defence—Charges in respect of Two Girls—Separate Committals—Joinder in One Indictment—"First Occasion on which he is Charged"—Criminal Law Amendment Act, 1922 (12 & 13 *Geo.* 5, *c.* 56), *s.* 2.

By the proviso to section 2 of the Criminal Law Amendment Act, 1922, in the case of a man of twenty-three years

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or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence "on the first occasion on which he is charged with an offence" of carnal knowledge of a girl between the ages of thirteen and sixteen.

The defendant appeared before magistrates on a charge of having had carnal knowledge of H., a girl between the ages of thirteen and sixteen, between June 7 and June 28, 1953, and was committed for trial. He subsequently appeared before another bench on a similar charge in relation to C. between April 1 and July 31, 1953, and was committed for trial on that charge also. At assizes each of the charges was included in a separate count of the same indictment.

Held, that a man was "charged" within the meaning of the above proviso when he first appeared before a court which had jurisdiction to determine the matter, and that in the present case, there having been a committal for trial, that court was the assizes; that the "first occasion" was the appearance of the defendant at assizes on the two counts on the one indictment; and that the defendant was, therefore, entitled to set up the statutory defence in respect of both girls.

Trial at assizes before Streatfeild J.

The defendant appeared at Essex Assizes on November 18, 1953, on an indictment which charged him, in the first count, with carnal knowledge of Pearl Maureen Helman, a girl between the ages of thirteen and sixteen, between June 7 and June 28, 1953, and, in the second count, with a similar offence in respect of Jean Carless between April 1 and July 31, 1953. The defendant had been committed for trial in respect of the first charge by one bench of magistrates, and subsequently committed in respect of the second charge by a different bench. The defendant, being under twenty-four years of age, desired to raise the statutory defence of reasonable cause to believe that the girl was over sixteen in respect of each count.

E. Russell, for the defendant:

It is submitted that the statutory defence is open to the defendant on both counts of the indictment. The question at issue is, when is the "first occasion" when a man is charged with an offence of this nature? It is submitted that it is not

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when he receives a summons from the police, or when he appears before the magistrates, but when he appears before the final court of trial. That might well be, in many cases, the first time that a defendant would realise that the defence was open to him. In ROGERS, 36 Cr.App.R. 203; [1953] 1 Q.B. 311, it was held that convictions could not be on separate occasions unless they had taken place at different sessions or assizes, and that two convictions at the same sessions or assizes would not count, and that decision, though under a different statute, throws some light on the manner in which the word " occasion " should be construed in the Act of 1922.

F. H. Lawton, for the Crown :

It is not always useful to try to draw inferences from the construction of the word under consideration in a different statute. One must try to derive the interpretation of the words " charge " and " occasions " from the relevant section itself. It is conceded on behalf of the Crown that, in any event, the service of the summons on the defendant by a police officer could not constitute a charge. It is more difficult to say that the appearance in the magistrates' court could not, in view of rule 5 of the Magistrates' Courts Rules, 1952. There would certainly have been a charge if the magistrates had refused to commit for trial. The common-sense view of the statute would appear to be that the intention of Parliament was that, once a young man has appeared at assizes and experienced a criminal trial ending in his acquittal, that was to be a warning to him not to have connection with young girls in the future. The difficulty is in the use of the word " charged " and in saying that the appearance at assizes is the first occasion on which the defendant is charged, when he has already in one sense been charged before the magistrates, though that may well have been the intention of the Act.

STREATFEILD J. : I have to rule upon this matter of law, which I do not think has arisen before, and is probably unlikely to arise again. I have to construe the meaning of section 2 of the Criminal Law Amendment Act, 1922, which amended

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section 5 of the Act of 1885. The Act of 1922 laid down that reasonable cause to believe that a girl was of or above the age of sixteen shall not be a defence to a charge under section 5 of the 1885 Act, provided, however, that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section.

Mr. Lawton has rightly pointed out that that section deals with defence. It provides, however, what is not a defence to the ordinary man, but in the case of a young man of twenty-three years of age or under it says that in certain circumstances there shall be a defence to a charge. The circumstances of this case are somewhat unusual. The accused is charged in respect of two girls under the age of sixteen. He was committed for trial by the justices in respect of one of them. He was then brought once more before the justices on a later and separate occasion and committed for trial in respect of the second girl, and the case now comes before me on both charges, joined in one indictment. He seeks to claim that he is entitled to set up the statutory defence in respect of not only one girl, but both girls, on the ground that today at the assizes is the first occasion upon which he has been charged with an offence under this section.

I cannot help thinking that very likely this situation was not contemplated by the draftsmen of the Act of Parliament, but nevertheless I have to give a construction on the words which in fact are used, and I have to rule on what is meant by a " charge " when a charge is made. It is agreed by counsel that a charge within the meaning of the section is not that which is stated by a police officer verbally to a man when he is charging him with an offence. The next question is whether a man is charged before the justices, or whether he is not charged effectively until he appears before a jury on an indictment. I have come to the conclusion that the proper construction to put upon the word " charge " is that there is a charge before a court which has jurisdiction to determine

the matter in question. That may well be the justices, if they refuse to commit for trial. They hear the evidence as examining magistrates; they then determine the question whether there is a prima facie case for committal for trial, and if they refuse to commit, there clearly would be a charge before a court having jurisdiction to determine it. But if the justices, in fact, commit for trial they are not adjudicating upon the case at all; the only thing they have determined is whether there is a prima facie case to answer, and there being one, they have committed for trial. The man is then brought before the assizes on indictment, and it seems to me that then, for the first time, he is before a court having jurisdiction to determine the matter, having already been committed for trial by the justices.

The next question for my decision is this: What is meant by an " occasion " and whether, if a man appears on an indictment on two counts, it is one occasion or two occasions. Force is lent to the argument that it is really two occasions when one bears in mind that there have been separate committals for trial, although by the same justices, but on separate occasions. But for that purpose I think I must have regard to ROGERS, 36 Cr.App.R. 203; [1953] 1 Q.B. 311.

It is quite true, as Mr. Lawton has submitted, that one must not necessarily come to the conclusion that the same word in one Act of Parliament bears precisely the same construction or meaning as it does in another Act of Parliament. The fact, however, remains that in the Criminal Justice Act of 1948, in sections 21 and 22 there occurs three times the phrase, " on an occasion," in connection with a conviction. The Court of Criminal Appeal held in ROGERS' CASE (*supra*) that, where a man appears on one indictment and is convicted of two offences charged in separate counts of that indictment, the resulting conviction is only one occasion of a conviction. In those circumstances it does seem to me to be difficult to put a different interpretation on the word " occasion " in the Act of 1922, holding, as I do, that the charge is made on the indictment.

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I admit that the matter is not beyond doubt, but I think there is another principle that one ought to apply, and it is this: This section with its proviso in fact exists for the protection of the liberty of the subject, and if there is any doubt in its construction I think that one ought to lean more in favour of the subject than against him. In those circumstances I have come to the conclusion, following as I do, the principle of the case of ROGERS (*supra*), that the occasion which is applicable is the occasion of his appearance before this court on two counts of one indictment. It follows, therefore—although it may not have been in the contemplation of the legislature at that time—that this defendant is entitled to set up the defence under section 2 of the Act of 1922 in respect of both counts of the indictment, being on one occasion.

[The trial then proceeded, and the jury returned a verdict of Not Guilty on both counts.]

Solicitors: D. E. Morgan, Chelmsford, for the Crown; Houghton & Co., Romford, for the defendant.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE SELLERS AND MR. JUSTICE BARRY

1953
Dec. 14, 18

WILLIAM JOHN VICTOR MISKELL

Gross Indecency—Attempt to Procure—Indecent Gestures to and Conversation with Boy—Invitation to Further Meeting.

The appellant, a British corporal serving in Germany, met a German boy of fourteen in a street, took him to a café and bought him refreshments, and then into a park, where he sat alone with the boy and made indecent gestures and indulged in indecent conversation, though he did not specifically invite the boy to participate in an act of indecency with him. He

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suggested to the boy that they should sleep out together in a park or in the woods, and asked the boy to meet him next night, saying that they could then go to a cinema or for a walk. The next night the appellant met the boy at the appointed place and invited him to go for a walk. The appellant was then arrested, and was subsequently charged with and convicted of attempting to procure the boy to commit an act of gross indecency with the appellant.

Held, that, in view of the surrounding circumstances, which could properly be considered, the court had been rightly directed that the acts of the appellant could amount to an attempt to procure the commission of an act of gross indecency, and that the conviction must stand.

COPE (1921) 16 Cr.App.R. 77 referred to and applied.

Appeal against conviction.

The appellant, a corporal in the Army Catering Corps, was convicted by District Court-Martial at Hamburg, on a charge of attempting to procure a German boy aged fourteen to commit an act of gross indecency with him, and was sentenced to fifty-six days' detention and to be reduced to the ranks.

On May 16, 1953, the appellant spoke to the boy in a street in Hamburg, and took him to a café, where he bought him beer and an ice cream. They then went into a park, where they sat on a seat. The appellant put his arm round the boy, made indecent gestures to him and indulged in indecent conversation with him, though he did not specifically suggest that they should participate in indecent conduct. He suggested that they might sleep out together in a park or in the woods, and asked the boy to meet him next night, promising him ten marks if he did so and saying that they could then go to a cinema or for a walk. The next night the appellant met the boy at the appointed place, and, after saying that it was too late to go to a cinema, invited the boy to go for a walk with him. The appellant was then arrested.

Ian McLean, for the appellant.
E. Garth Moore, for the Crown.

Cur. adv. vult.

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Dec. 18. The judgment of the court was read by

HILBERY J.: The accused was found guilty by District Court-Martial at Hamburg of attempted gross indecency with a male person and was sentenced to fifty-six days' detention and to be reduced to the ranks, and he appeals against that conviction by leave of the court.

The facts can be shortly stated. On the afternoon of May 16, 1953, a German boy was walking along a street in Hamburg when the appellant spoke to him. The appellant asked him to show him the way to the park. He then asked about a café and they went together to a café where the appellant gave the boy a beer and an ice cream. They then went to the park, and when in the park they sat on one of the seats for a few minutes. The appellant put his arm round the boy's shoulder, and with his hand dangling down his front, pointed at his private parts. The appellant asked if he had a little one down there and said he had a big one. He also asked whether the boy had ever had sexual intercourse before, using the German word "*gefickt.*" The appellant proposed that they should meet at some time at the station, and suggested the next day at 7 o'clock, and that they should sleep out together in the park or forest at some time. The boy said he slept at home, but he agreed to meet the appellant, saying he would ask his father. The next day the appellant kept the appointment which had thus been arranged, and when he met the boy looked at his watch and said: "It is too late to go to the cinema; we'll take a walk." The police then arrested the appellant. All those facts were unchallenged by the appellant, and no evidence was offered by him or on his behalf. It was submitted that the evidence only amounted at the most to evidence of acts of preparation for procuring the commission of the offence and did not amount to evidence of an attempt to procure the commission. The same contention has been argued as the ground of appeal. No criticism of the summing-up by the Judge Advocate was advanced by the appellant.

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The sole question upon which this appeal depends is whether the act or acts of the appellant could constitute, as a matter of law, an attempt to procure the boy to commit an act of gross indecency with the appellant. It has long been established that whether an act or acts can amount to an attempt to commit a crime is a question of law. Once it is decided by the court that what the accused has done can be an attempt to commit the crime, it is a question of fact for the jury whether what was done should be decided to have been an attempt. Not all acts which are steps towards the commission of a crime can be regarded as attempts. Some may be too far removed from the commission of the crime to be regarded as attempts to commit the crime; but just where the distinction is to be drawn between preliminary acts of preparation and acts which are nearly enough related to the crime to amount to attempts to commit it is often a difficult and nice question. This case indeed affords an example of the difficulty.

The principle to be applied by the court in deciding the question was stated by Parke B. in EAGLETON (1855) 1 Dears. C.C. 376, 515. That statement of the principle was approved and followed in ROBINSON, 11 Cr.App.R. 124; [1915] 2 K.B. 342 and WOODS (1930) 22 Cr.App.R. 41, at p. 44, in the following words: "The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are."

The difficulty lies in the application of the principle to the facts (*per* the Lord Chief Justice (Lord Reading) in ROBINSON, 11 Cr.App.R. at p. 129; [1915] 2 K.B. at p. 348). But in COPE (1921) 16 Cr.App.R. 77 where, as in this case, the charge was one of attempting to procure the commission of an act of gross indecency, Trevethin L.C.J. in the considered written judgment of the court, after pointing out that the letters in question, which were said to be the acts constituting the attempt to procure, did not contain an undisguised invitation

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to commit the offence, laid it down that in order to see whether the letters did contain such terms that Price (the addressee) would see in them an invitation to commit an act of gross indecency with the appellant, the surrounding circumstances might and should be examined.

The circumstances here were that the appellant had spoken to this boy in the street, had taken the boy to a café and given him beer and an ice cream, had then gone into a park with the boy and there when sitting with him alone had said and done things which manifested his criminal purpose of inducing the boy to commit an act of gross indecency with him. After putting an arm round the boy and pointing to the boy's genital organ and asking if the boy had a little one there and saying he had a big one, he had followed this by suggesting that they should sleep out together in a park or the woods and had asked the boy in coarse terms whether he had ever had sexual intercourse. He had then asked the boy to meet him the next night, promising him a reward of ten marks if he did so, saying they could then go to a cinema or for a walk. The next night he went to the suggested meeting place and met the boy, and then, making the excuse that it was too late to go to a cinema, invited the boy to go with him for a walk.

It is important to bear in mind that the question is not whether this invitation and meeting in the circumstances amounted to an attempt to commit an act of gross indecency. They could not be said to be that. The question is whether these acts of the appellant were an attempt to procure the commission of that offence. Applying the principle as stated, was there on these facts an act sufficiently proximate to procuring the boy to commit the offence to amount to an attempt to procure? It is a question, not whether there was an act of procuring, but whether there was an act which was an attempt to procure. The conduct of the appellant immediately before and at the time of the invitation, in our view, manifested the purpose of the accused in inviting the boy to meet him the next evening and in meeting him and inviting him to go for a walk. The walk which had already taken place

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had been used for making indecent overtures and suggestions. That conduct made manifest the purpose of the invitation and the meeting and the suggestion of another walk. That the appellant by his conduct and talk had intended to suggest to the boy that they should act indecently together can scarcely be doubted in view of the fact that the appellant himself said to the police after he was arrested: "Well, what the boy said about Saturday night is all true, but I only met him tonight in order to put him off. I had no intention of doing what I suggested."

The law does not, however, punish a man for a guilty intention, but for the overt act done as part of the carrying out of that intention. Now the intention of the appellant here was undoubtedly to procure an act of gross indecency with the boy. The invitation and the meeting were overt acts. When that invitation and meeting are considered in the light of the circumstances in which the invitation was issued and the meeting took place, it appears to us that those acts cannot be said to be incapable of being attempts to procure the boy to commit an act of gross indecency with the appellant. Once it is decided that they could be so regarded as a matter of law, then the question whether they were an attempt or not becomes one of fact for a jury or, as in this case, for the court-martial.

In COPE'S CASE the Lord Chief Justice (Lord Trevethin) said (at p. 82): "The letters in the present case obviously do not contain an undisguised invitation nor is a code suggested, but it is said that they do contain terms which would have conveyed the invitation to the mind of their intended recipient as unmistakedly as if it had been set out in express terms and that the jury have by convicting found that this is so." He follows that observation by the passage which I have already quoted. Later on, he said: "We think there was enough [in the letter] to entitle the jury to find that Price would have read into it an invitation to repeat with the appellant the offence which he had committed with Riley and therefore that the sending of the letters was an attempt to procure Price."

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That invitation in that letter was no less remote from the procuring than the invitation given by the appellant in this case and the meeting in fulfilment of that invitation coupled, as it was, with a further invitation to another walk. Here, as in COPE'S CASE (*supra*), in the circumstances which had occurred, the invitation in question was understood to be an invitation to an act of gross indecency, and the boy's father and the police were informed, and it is not contended that an invitation, however veiled, which in the circumstances is an invitation to commit an act of gross indecency, is not an attempt to procure such an act.

For these reasons, the appeal is dismissed.

Appeal dismissed.

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